DOCUMENT RESUME

ED 163 747 EC 112 877

AUTHOR	Halloran, William; And Others
TITLE	Vocational Education for the Handicapped: Resource Guide to Federal Regulations.
INSTITUTION	Texas A and M Research Foundation, College Station.; Texas Education Agency, Austin.; Texas Regional Resource Center, Austin.
SPONS AGENCY	Bureau of Education for the Handicapped (DHEW/OE), Washington, D.C.; Bureau of Occupational and Adult Education (DHEW/OE), Washington, D.C.
REPORT NO	DHEW-OE-498AH70179
PUB DATE	Apr 78
GRANT	G0077002536
NOTE	267p.; Not available in hard copy due to marginal legibility of print
AVAILABLE FROM	Texas Education Agency, 201 East 11th Street, Austin, Texas 78701 ($3.00)
EDRS PRICE	MF-$0.83 Plus Postage. HC Not Available from EDRS.
DESCRIPTORS	Definitions; Elementary Secondary Education; *Federal Legislation; *Federal Regulation; Financial Policy; *Handicapped Children; Individualized Programs; Staff Improvement; Student Placement; *Vocational Education

ABSTRACT

The report analyzes regulations and considers implications for special and vocational educators of Section 504 of the Rehabilitation Act of 1973, the Education for All Handicapped Children Act, and the Vocational Education Act of 1963, amended in 1976. Initial sections focus on the content of the laws, while a separate chapter compares the regulations and considers implications for such aspects as definitions, educational placement, individualized education programs, personnel development, funding, and vocational guidance and counseling. Nearly one-half of the document is composed of appended Federal regulations. (CL)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

ED163747

U.S. DEPARTMENT OF HEALTH, EDUCATION & WELFARE
NATIONAL INSTITUTE OF EDUCATION

THIS DOCUMENT HAS BEEN REPRODUCED EXACTLY AS RECEIVED FROM THE PERSON OR ORGANIZATION ORIGINATING IT. POINTS OF VIEW OR OPINIONS STATED DO NOT NECESSARILY REPRESENT OFFICIAL NATIONAL INSTITUTE OF EDUCATION POSITION OR POLICY

VOCATIONAL EDUCATION FOR THE HANDICAPPED: RESOURCE GUIDE TO FEDERAL REGULATIONS

Prepared for the Texas Education Agency

Department of Special Education

by

William Halloran

Theodore Thomas Foley II

Jane Ann Razeghi

Marc Hull

After the original free distribution to authorized institutions, additional copies may be purchased for $3.0 ; however, with the increasing demand for educational material, the supply at times may be exhausted.

Texas Regional Resource Center

April, 1978

"PERMISSION TO REPRODUCE THIS MATERIAL HAS BEEN GRANTED BY

Linda Kemp

TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC) AND USERS OF THE ERIC SYSTEM."

EC113877

This publication was supported in part by Research Grant Number G0077002536, Project Number 498AH70179, from the Bureau of Occupational and Adult Education, Office of Education, Department of Health, Education, and Welfare, Washington, D.C., to the Texas A&M Research Foundation. It was also supported in part by a grant with the Bureau of Education for the Handicapped, Office of Education, Department of Health, Education, and Welfare, under Public Law 91-230, EHA, Title VI, Part C: Contract Number OEC-0-7898 (prime contractor, Texas Education Agency, Austin, Texas).

The opinions expressed herein do not necessarily reflect the position or policy of the U.S. Office of Education, Texas Education Agency, or the Texas Regional Resource Center, and no official endorsement should be inferred.

ACKNOWLEDGMENTS

Our appreciation is extended to the many people who have helped make this publication possible. Special thanks are made to the helpful personnel from the Bureau of Education for the Handicapped, the Bureau of Occupational and Adult Education, the Texas Education Agency, the Vermont Department of Education, Texas A&M University, and the George Washington University.

Further, great appreciation is extended especially to Ms. Marilyn Kok for her unfailing editorial assistance and to Ms. Connie Kay for patience and excellence in typing from illegible manuscripts.

COMPLIANCE WITH TITLE VI, CIVIL RIGHTS ACT OF 1964; TITLE IX OF THE EDUCATION AMENDMENTS OF 1972; AND THE MODIFIED COURT ORDER, CIVIL ACTION 5281, FEDERAL DISTRICT COURT, EASTERN DISTRICT OF TEXAS, TYLER DIVISION

Reviews of local education agencies pertaining to compliance with Title VI Civil Rights Act of 1964; Title IX of the Education Amendments of 1972; and with specific requirements of the Modified Court Order, Civil Action No 5281, Federal District Court, Eastern District of Texas, Tyler Division are conducted periodically by staff representatives of the Texas Education Agency. These reviews cover at least the following policies and practices:

(1) acceptance policies on student transfers from other school districts;

(2) operation of school bus routes or runs on a non-segregated basis;

(3) non-discrimination in extracurricular activities and the use of school facilities;

(4) non-discriminatory practices in the hiring, assigning, promoting, paying, demoting, reassigning, or dismissing of faculty and staff members who work with children;

(5) enrollment and assignment of students without discrimination on the basis of race, color, national origin, or sex;

(6) non-discriminatory practices relating to the use of a student's first language; and

(7) evidence of published procedures for hearing complaints and grievances.

In addition to conducting reviews, the Texas Education Agency staff representatives check complaints of discrimination made by a citizen or citizens residing in a school district where it is alleged discriminatory practices have occurred or are occurring.

Where a violation of Title VI of the Civil Rights Act and/or Title IX of the Education Amendments of 1972 is found, the findings are reported to the Office for Civil Rights, Department of Health, Education and Welfare.

If there is a direct violation of the Court Order in Civil Action No. 5281 that cannot be cleared through negotiation, the sanctions required by the Court Order are applied.

CONTENTS

1. INTRODUCTION 1

2. THE REHABILITATION ACT OF 1973: (P.L. 93-112), Section 504 . 9

Subpart A--General Provisions 10
Subpart B--Employment Practices 12
Subpart C--Program Accessibility 13
Subpart D--Preschool, Elementary, and Secondary Education 13
Subpart E--Postsecondary Education 16
Subpart F--Health, Welfare, and Social Services 17
Summary 18

3. THE EDUCATION OF THE HANDICAPPED ACT: Part B, As Amended by the Education for All Handicapped Children Act of 1975 (P.L. 94-142) 21

Part 121a--Assistance to States for Education of Handicapped Children 25
Subpart A--General 25
Subpart B--State Annual Program Plans and Local Applications 28
Subpart C--Services 34

Subpart D--Private Schools 40
Subpart E--Procedural Safeguards 41
Subpart F--State Administration 45
Subpart G--Allocation of Funds; Reports 47
Summary 48

4. THE VOCATIONAL EDUCATION ACT OF 1963: As amended by The Education Amendments of 1976 (P.L. 94-482) 51

The Impact of the Vocational Education Act on the Handicapped 52
Part A--State Vocational Educational Programs 53
Subpart 1--General Provisions and State Administration . . 53
Subpart 2--Basic Grant 60
Subpart 3--Program Improvement and Supportive Services . . 63
Subpart 4--Special Programs for the Disadvantaged 65
Part B--Commissioner's Discretionary Programs of Vocational Education 66
Subpart 1--Program Improvement 67
Subpart 2--Indian Tribes 68
Subpart 3--Training and Development Programs for Vocational Education Personnel 68
Subpart 4--Emergency Assistance for Remodeling and Renovating of Vocational Education Facilities . . 69
Subpart 5--Bilingual Vocational Education 70
Summary 70

5. COMPARING THE REGULATIONS: Definitions, Issues, and Implications 73

Definition: Handicapped 75
Definition: Special Education 79
National, State, and Local Advisory Councils 82
Least Restrictive Alternatives (LRA) 87

Individual Education Programs 90
Personnel Development 94
Standards of the State Education Agency 97
Funding 104
Exemplary and Innovative Programs 108
Vocational Guidance and Counseling 110

APPENDICES 113

NONDISCRIMINATION ON BASIS OF HANDICAP:
Programs and Activities Receiving or
Benefiting from Federal Financial Assistance
(45 CFR 80, 81, 84) 115

EDUCATION OF HANDICAPPED CHILDREN:
Implementation of Part B of the Education
of the Handicapped Act
(45 CFR 100b, 121a, 121m) 143

ASSISTANCE TO STATES FOR EDUCATION
OF HANDICAPPED CHILDREN:
Procedures for Evaluating Specific
Learning Disabilities (45 CFR 121a) 191

VOCATIONAL EDUCATION, STATE PROGRAMS AND
COMMISSIONER'S DISCRETIONARY PROGRAMS
(45 CFR 104, 105) 197

1

INTRODUCTION

In the past few years there has been a tremendous increase in the national commitment toward expanding and improving the opportunities available for handicapped individuals. In particular, Congress has passed legislation guaranteeing the civil rights of handicapped persons in education, vocational training, and job placement and advancement. Getting this far has been a long step forward, but there is still work to be done before all handicapped individuals will truly have their guaranteed rights and opportunities.

It is interesting to note that for a long time, the federal government failed to adequately guarantee any comprehensive rights to the handicapped. Gradually, as other civil rights movements grew stronger, laws were passed to help them, but in spite of good intentions, these laws were paternalistic and ineffective. Stairs were just as difficult to climb, elevators almost as scarce. Rather than being pushed to the back of the inaccessible bus, handicapped individuals were left off the bus completely. Unfortunately, segregation on the basis of handicap continued and

even in education, equal opportunity was still just a goal for the millions of handicapped children who had never received any education.

At last, in the early 1970's handicapped individuals started winning a series of court cases establishing their constitutional rights. Given the mandate from the courts and the petitions from the people, Congress started moving through the long, slow process of passing laws.

This long process has yielded three major laws affecting vocational education for the handicapped: the Rehabilitation Act of 1973; the Education of the Handicapped Act, amended in 1975; and the Vocational Education Act of 1963, amended in 1976. To clarify these laws and affirm their significance, this report will first highlight each law's regulations, then compare and analyze the regulations' major points and how they relate to the special needs of handicapped youth. More specifically, the report will show how these laws relate to special and vocational educators.

The Rehabilitation Act of 1973 (P.L. 94-112) is the basic civil rights legislation for handicapped persons. As educators, section 504 particularly concerns us because it says projects or agencies receiving federal funds must not discriminate on the basis of handicap. Since most schools receive some federal money, they must comply with section 504, or risk losing all federal funds. This section lacks funds for encouraging nondiscrimination but the sanctions and

implications of the law are implemented in its regulations. As long as there is federal assistance for public education, section 504 will continue to help guarantee handicapped persons' rights. Thus, section 504 has the potential for remaining in effect long after other more specific laws have expired.

The Education of the Handicapped Act (EHA) is one of these more specific laws, in that it just deals with the educational opportunities of handicapped persons from birth to age twenty-one. Part B of this law was amended by the Education for All Handicapped Children Act of 1975 (P.L. 94-142). It seeks to provide public schools with the considerable amount of money needed to make an appropriate public education available to all handicapped youth at no cost to their parents. It closely parallels section 504 and, in turn, points the way to a still more specific law.

The Vocational Education Act of 1963 which was completely revised in the Education Amendments of 1976 (P.L. 94-482), provides set-aside funds for the vocational education of handicapped youth.

While all three laws have comparable provisions, the first one provides a very broad coverage to all handicapped persons, while the others provide more specific protections to a more narrowly defined group of handicapped individuals. In spite of these different emphases, however, handicapped individuals can be protected by all three laws. Furthermore, programs, in which handicapped students are

enrolled can receive federal assistance from both the Education for the Handicapped Act and the Vocational Education Act.

A word about laws, regulations, and their basic differences: Congress writes the law, and because the executive branch is responsible for enforcing laws, members of the White House staff write the regulations. After Congress passes a law, the President will usually order appropriate members of his staff to develop guidelines and rules called regulations. They are the result of many prepublication hearings and controversies, but without these regulations, people often interpret the law differently or do nothing because they claim the law is unclear.

For instance, a law that says school buildings must be accessible to handicapped students will make little difference to a school board whose budget is already in the red. However, if the problem of limited funds has been raised at one of these prepublication hearings, the regulations may provide specific directions on how to obtain funds for making buildings accessible. Then the school board will have money for adding ramps to their school buildings. In this fashion, a law usually states what must be accomplished and regulations state how it will be accomplished.

Regulations are usually enforced by the federal agency that developed them. Section 504 of the Rehabilitation Act is the responsibility of the Office of Civil Rights (OCR) in the Office of

the Secretary of Health, Education, and Welfare. The Rehabilitation Services Administration (RSA) is responsible for services under other parts of the Rehabilitation Act, but this overview will not cover these services because they usually apply to individuals who have completed their public education. The Part B provisions of the Education for the Handicapped Act are implemented by the Bureau of Education for the Handicapped (BEH) in the Office of Education (OE). The Vocational Education regulations are under the Bureau of Occupational and Adult Education (BOAE), also in the Office of Education. In addition to the federal agencies, the regulations direct responsibility toward the state and local public agencies. These agencies provide valuable input while the regulations are being developed.

Once the regulations are finally approved, they are published in the Federal Register (FR), and are annually compiled with the old regulations and published in the Code of Federal Regulations (CFR). These publications can be purchased directly from the U.S. Government Printing Office or obtained from your Congressman, Senator, or a major library.

How do you read the regulations? It helps to have a roadmap, such as this report, but if a new regulation comes out and you need to know in a hurry, these tips may help. The regulations usually follow the same sequence of subparts as the law they are interpreting and implementing. And although totally unrelated to the identifying

numbers and letters used in the laws, the regulation's numbers follow a specified pattern. In citing a section of the regulations two forms of shorthand are commonly used; for example, "42 FR 42478" or "45 CFR 121a.5." Both refer to the same section of the Education of Handicapped Children regulations defining "handicapped children." The first example refers to volume 42 of the Federal Register, page 42478, and is occasionally accompanied by the date on which the regulation was published, in which case it would read "42 FR 42478 (August 23, 1977)." The second example refers to Title 45 of the Code of Federal Regulations, Part 121a, Section 5. Incidentally, this citation yields further information. From 121a we know that this comes from Chapter One, relating to the Office of Education within the Department of Health, Education, and Welfare. Furthermore, paragraphs and subparagraphs within a section may be identified by symbols included within parentheses.

You might notice that there are often gaps in the sequence of numbers used to identify the sections. These gaps leave room for possible revisions: for example, the recent amendments on specific learning disabilities were inserted in sections 121a.540 to 121a.543 without disturbing the sequence of the regulations.

For your convenience and information, the appendices contain the currently approved final regulations for the laws. These original regulations will give you the complete story and will therefore help you avoid misinterpreting these very important, life-changing laws.

Through these laws, our nation has given birth to equal educational rights for the handicapped. As with other rights, there are also responsibilities and in this case their main burden lies with federal, state and local governments and agencies which must interpret and implement the laws. At the dagger end of these responsibilities, however, are the teachers and the handicapped youth themselves, who must set the precedents for others to follow more quickly in their paths.

2

THE REHABILITATION ACT OF 1973

(P.L. 93-112)

SECTION 504

In September 1973, Congress passed the Rehabilitation Act, a statute intended to usher in a new era of equality for America's 35 million handicapped citizens. Section 504 of the Act, the first major Federal law protecting the civil rights of the handicapped, prohibits discriminating on the basis of physical or mental handicaps in all federally-assisted programs and activities. The final regulations implementing section 504 were signed in April, 1977, four and a half years after the law was enacted. In addition to prohibiting intentional and unintentional discrimination, the regulations also require recipients of HEW funds to take positive steps toward giving handicapped citizens equal opportunities in employment, and in health, education, and social service programs.

The language of section 504 is remarkably similar to the nondiscriminatory provisions of Title VI in the Civil Rights Act (applying to racial discrimination) and Title IX in the Education

Amendments of 1972 (applying to educational discrimination on the basis of sex).

As with Titles VI and IX, the Office of Civil Rights will monitor compliance with section 504. Because of the Act's broad coverage and the ease with which complaints can be filed, much litigation is expected to accompany the enforcement of the Act. Early in 1978, a Federal court declared that the Office of Civil Rights must employ nearly 900 additional personnel to monitor compliance with the nation's civil rights laws, including section 504. Thus, educators can expect greater assistance from OCR in implementing section 504, and at the same time can anticipate rigorous enforcement of the law. In order for recipients of federal funds to fulfill the requirements of this far-reaching mandate they will need to understand the numerous provisions specified in the 7 subparts of the regulations for section 504.

SUBPART A--GENERAL PROVISIONS

Subpart A gives the purpose of the regulations and defines important terms--including "handicapped person," which means any person who has a physical or mental impairment substantially limiting one or more major life activities. Subpart A also lists several discriminatory actions which the law prohibits. Under the law's provisions, recipients of federal assistance may not:

- Deny qualified handicapped persons equal opportunities to participate in or benefit from any program or activity solely on the basis of handicap

- Provide aids, benefits, or services unequal to those provided for nonhandicapped persons

- Provide aids, benefits, or services that are less effective than those provided for nonhandicapped persons

- Provide different or separate aids, benefits, or services unless they are necessary to provide equal opportunities for the handicapped

- Limit a handicapped individual's enjoyment of any aid, benefit, or service that nonhandicapped individuals enjoy

- Deny handicapped individuals the right to participate in regular programs or activities just because of special programs and activities that are available to them

In making opportunities equally available to the handicapped, aids, benefits, and services must be provided in the most integrated setting appropriate for the individual. Furthermore, in considering the appropriateness of an aid, benefit, or service, the individual's achievement cannot be used as the sole criterion for determining

effectiveness. In other words, to be equally effective, a program or activity must provide equal opportunity for achievement, even though the program or activity does not produce the identical achievement for both handicapped and nonhandicapped persons.

The remainder of Subpart A sets forth a system for administering the Act, including requirements for assuring funding agencies of compliance, self-evaluation, remedial action, and grievance procedures. All recipients of federal assistance must assure their funding agencies that they will comply with section 504 in a form provided by the government. In addition, each recipient must completely evaluate its current policies and practices to determine if they are discriminatory in any way; and, to the greatest possible extent, handicapped persons and the organizations representing them are to be involved in the self-evaluating process. All discriminatory practices must be noted in writing and remedial action taken to eliminate them. If a recipient has 15 or more employees, it is required to appoint at least one person to coordinate its efforts to comply with the Act.

SUBPART B--EMPLOYMENT PRACTICES

Subpart B of section 504 prohibits discrimination in employment and requires recipients of funds from the Education of the Handicapped Act to take positive steps to employ and advance qualified handicapped persons. This subpart further requires recipients of federal assistance to reasonably accommodate the physical and mental handicaps

of applicants and of present employees. Reasonable accommodation may include making facilities readily accessible, restructuring job elements, modifying equipment, and providing readers and interpreters. Other issues pertaining to employing the handicapped, such as non-biased selection criteria and prohibiting certain pre-employment inquiries, are also discussed in Subpart B.

SUBPART C--PROGRAM ACCESSIBILITY

Subpart C sets forth requirements for program accessibility. Essentially, the regulations for this subpart prohibit recipients of federal assistance from denying services because certain facilities are inaccessible. Where structural changes are not possible, alternative steps are suggested, such as moving inaccessible programs to accessible areas.

SUBPART D--PRESCHOOL, ELEMENTARY, AND SECONDARY EDUCATION

Subpart D applies to preschool, elementary, secondary, and adult education programs, and reiterates many provisions from P.L. 94-142, the Education of All Handicapped Children Act. To comply with these provisions a recipient of HEW assistance must:

- Provide all eligible handicapped persons with a free appropriate public education, one which meets the handicapped person's needs as appropriately as equivalent programs meet nonhandicapped

persons' needs

- Annually identify all eligible handicapped persons not receiving a free appropriate public education

- Bear the costs of placing handicapped persons in private programs, or in programs other public agencies operate; unless parents or guardians voluntarily place their children in a private facility

- Place handicapped persons in regular educational environments unless it can be demonstrated that they cannot be appropriately served in the regular program even if supplementary aids and services are provided

- To the maximum possible extent, include handicapped persons in regular extracurricular and club activities, including physical education and athletic activities

- Ensure the separate or special facilities, aids, and services for the handicapped are comparable to the facilities, aids, and services for the nonhandicapped

- Use appropriate evaluating techniques and knowledgeable people when determining appropriate placements for handicapped students

- Implement procedural safeguards which ensure the rights of handicapped persons and their parent(s) or guardian(s)

- Provide personal, academic, and vocational counseling, guidance, or placement services on a nondiscriminatory basis and ensure that handicapped students are not counseled toward more restrictive career objectives than are nonhandicapped students with similar interests and abilities

Although there are many similarities between subpart D of section 504 and P.L. 94-142, there is one fundamental difference that could conceivably have far-reaching consequences. Under the provisions of Section 504, an individual may be considered handicapped if that individual actually has, is regarded as having, or is recorded as having any physical or mental impairment which substantially limits one or more major life activity--such as caring for one's self, performing manual tasks, learning, or maintaining appropriate interpersonal relationships. Because this definition is broader than that which is stated in P.L. 94-142, many individuals who would not otherwise qualify for special education services (i.e., meet the various classification criteria outlined in P.L. 94-142) may qualify for special services and education provisions under Section 504. This issue is discussed more fully on pages 27 and 75.

SUBPART E--POSTSECONDARY EDUCATION

Subpart E specifies that no qualified handicapped student shall be excluded from, denied the benefits of, or be otherwise discriminated against on the basis of handicap in any academic, occupational training; research, housing, insurance, health, counseling, financial aid, physical education, athletics, recreation, transportation or other extracurricular postsecondary education program or activity.

No test or other admissions criterion may be used if it discriminates against handicapped persons, and no limitations may be placed on the number or the proportion of handicapped persons admitted to postsecondary programs and activities. When preadmission tests are administered, the tests must validly predict success in the educational program or activity in question, and must reflect a handicapped applicant's aptitude or achievement, rather than reflecting the applicant's impaired sensory, manual, or speaking skills.

A recipient to which Subpart E applies must modify any academic requirements which discriminate against qualified handicapped students or applicants on the basis of handicap. This subpart, however, does not cover requirements relating directly to licensing or the essential program standards. Modifications could include changing the time permitted to complete a course, substituting course requirements, or adapting the way a specific course is conducted.

Qualified handicapped students may not be denied the benefits of or be excluded from any postsecondary program or activity because certain educational auxiliary aids are lacking, such as taped texts. interpreters, readers in libraries, or classroom equipment (including shop equipment) adapted for students with manual or orthopedic impairments. In addition, methods of evaluating handicapped students' achievement must reflect their actual achievement in courses, rather than their impaired sensory, manual, or speaking skills.

Any support services and accommodations provided for nonhandicapped students must also be provided for handicapped students. If, for example, housing is provided for nonhandicapped students, then comparable, convenient, and accessible housing must also be provided for handicapped students at no additional cost. The same requirement holds for financial aid, part-time employment, intercollegiate sports, recreation, social organizations, and personal, academic or vocational counseling services.

SUBPART F--HEALTH, WELFARE, AND SOCIAL SERVICES

Subpart F forbids discrimination on the basis of handicap in health, welfare, and other social service programs and requires larger recipients to provide necessary auxiliary aids for handicapped individuals. So hospitals must provide ways to communicate with persons with hearing impairments in emergency rooms, and cannot

discriminate against drug addicts or alcoholics who need medical treatment.

SUMMARY

As amended by the Rehabilitation Act Amendments of 1974, section 504 of the Rehabilitation Act of 1973 defines and prohibits discriminating against handicapped persons in any public and private agencies receiving federal grants or assistance. The final regulations from the Department of Health, Education, and Welfare (HEW), issued in April 1977, will serve as a model for regulations that other federal departments and agencies will issue. The Office of Civil Rights will enforce the HEW regulations in the same manner they have enforced other regulations concerning racial, ethnic, or sexual discrimination.

Section 504 mandates that any program or activity receiving financial assistance from the federal government may not discriminate against qualified handicapped individuals. Whether as employees or as consumers handicapped persons must be given equal opportunity for benefits in any federally assisted programs or activity. For handicapped individuals to achieve equal opportunity with nonhandicapped individuals, different programs and activities or services might have to be made available for them. Whenever possible, however, the regulations require that the handicapped person be integrated with nonhandicapped persons in a regular setting.

The legal penalties for not complying with these regulations may be quite severe; in fact, all federal financial assistance could be terminated. However, actually complying with the law's intent will depend on the goodwill of the recipients of federal grants. Handicapped individuals and their advocates can contribute insights that will change attitudes and help remove barriers and discriminating practices.

3

THE EDUCATION OF THE HANDICAPPED ACT

PART B, AS AMENDED BY

THE EDUCATION FOR ALL HANDICAPPED CHILDREN ACT OF 1975

(P.L. 94-142)

Efforts to direct the federal legislature toward educating the handicapped only started to become a unified concern in 1966, when Congress amended the Elementary and Secondary Act of 1965. This amendment, Title VI, provided grants to states and created federal agencies to help meet the educational needs of handicapped individuals. However, even the Education of the Handicapped Act (EHA), which replaced Title VI in 1970, was insufficient to meet their educational needs. Were handicapped students entitled to a free and appropriate education? This question was to be settled in a series of landmark court cases.

The first court case was "Pennsylvania Association for Retarded Children (P.A.R.C.) vs. Commonwealth of Pennsylvania" in 1971. This established the educational rights of mentally retarded school-age children in Pennyslvania. Later that year, in the "Mills vs. Board of Education of District of Columbia," another federal district court extended this right for all handicapped children in the nation's capital setting a precedent repeated in other court cases across the

nation. In 1974, the 93rd Congress passed stop-gap amendments to the EHA while they considered exactly how to help states meet handicapped individuals' educational needs. The efforts of the 93rd Congress laid the groundwork for the "Education for All Handicapped Children Act of 1975" (P.L. 94-142). Congress' primary intent was to insure benefits and rights for handicapped children and their families. They did this mainly by amending Part B and touching on other parts.

Readers may wish to note that within this overview and the succeeding discussions the "Education for All Handicapped Children Act of 1975" will be referred to either as "P.L. 94-142" (meaning the 142nd public law passed by the 94th Congress) or as "EHA" (which P.L. 94-142 amends). Furthermore, when the law refers to "handicapped children," this includes any handicapped individuals from birth to age 21. Because this overview is directed toward vocational educators, the authors will take the liberty of addressing these individuals as "youth."

As it now stands, the EHA has seven parts:

- Part A - General Provisions sets forth the title, defines terms, authorizes the Bureau of Education for the Handicapped (BEH) and the National Advisory Committee on Handicapped Children, requires recipients of funds under this act to employ the handicapped, and funds equipment, facilities, and the removal of barriers.

- Part B - Assistance for Education of All Handicapped Children describes the procedures a state must follow to receive federal aid.

- Part C - Centers and Services to Meet Special Needs of the Handicapped authorizes centers for deaf-blind students, centers for educating pre-school aged handicapped children, and regional resource centers, as well as any research, educational or innovative services connected with these centers.

- Part D - Training Personnel for the Education of the Handicapped provides grants and contracts to institutions of higher education for recruiting and training personnel, and to other agencies for informing handicapped youth and their advocates about available programs, services and resources.

- Part E - Research in the Education of the Handicapped authorizes research and demonstration projects.

- Part F - Instructional Media for the Handicapped provides centers to coordinate, produce and distribute captioned film and educational media.

- Part G - Special Programs for Children with Specific Learning Disabilities authorizes research, training, and model centers.

Recognizing the far-reaching effects P.L. 94-142 is expected to have on the education of handicapped children, administrators at the Office of Education took careful steps to involve professionals and the public by holding meetings and soliciting concept papers from parents, educators and special interest groups. Proposed rules were published on December 30, 1976 and more input was received through written comments, hearings and special meetings and conferences. After making necessary changes the Office of Education released the final regulations on August 23, 1977 in the Federal Register. However, the Department of Health, Education and Welfare will continue to review the regulations as state and local agencies discover the law's actual impact and consequence. It has already issued amendments redefining "specific learning disability" and establishing additional procedures for evaluating children who may have specific learning disabilities (Federal Register, December 29, 1977, pp. 65082-65085).

While P.L. 94-142 amended three parts of the Code of Federal Regulations (CFR), this overview will only examine the one dealing with federal assistance to the states. Of the other two parts one (Part 100b) concerns the general application a state must keep on record with the Commissioner of Education in order to meet the requirements of the General Education Provisions Act. The other (Part 121m) concerns incentive grants for educating handicapped children, ages three, four, or five. The following, then, surveys the regulations governing assistance to states for educating handicapped children (45 CFR 121a), particularly those aspects dealing

with vocational education for the handicapped.

PART 121a--ASSISTANCE TO STATES FOR EDUCATION OF HANDICAPPED CHILDREN

The regulations concerning federal assistance to states for educating handicapped children are divided into seven subparts: (A) General, (B) State Annual Program Plans and Local Applications, (C) Services, (D) Private Schools, (E) Procedural Safeguards, (F) State Administration, and (G) Allocation of Funds and Reports. Each will be discussed in the following overview. The regulations also include two useful appendices: Appendix A discusses the responses of the Office of Education to public comments, and Appendix B is a topical index.

SUBPART A--GENERAL

In addition to defining the terms that are used throughout the regulations, subpart A restates the law's purpose, applicability and conformity to other regulations.

Purpose. The EHA regulations list four main purposes.

- a free and appropriate public education should be available for each handicapped youth

- the rights of handicapped children and their parents should be protected

- the provision of education to all handicapped students through federal assistance to states local or other public agencies, and

- the effectiveness of these efforts as determined by measurement and assurance procedures

Applicability and General Provisions. These regulations apply to each state which receives money under Part B of the Education of the Handicapped Act. States must also keep on file a general application covering five assurances: (1) proper administration, (2) fiscal control and accounting, (3) reports, (4) supplanting, and (5) submission of the annual program plan. In its annual program plan, the state must represent all its public agencies which have direct or delegated authority to educate handicapped youth. Therefore, these regulations are binding whether or not a public agency is receiving funds under Part B. A public agency is still responsible for the rights and protection of children it refers or places in private institutions.

Definitions. In order to keep definitions consistent with current usage and the most recent research, the Office of Education has consulted not only the law, but also congressional reports and

professional associations. Subpart A lists terms which are defined later, in the specific subpart to which they apply, then defines terms occurring throughout the regulations.

Under the EHA, the term "handicapped children " is limited to individuals who require special education and related services because of an impairment which has been evaluated as being "mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, other health impaired, deaf-blind, multi-handicapped, or as having specific learning disabilities." Each term is defined in the regulations, which in turn is paraphrased on page 75. The December 29, 1977 amendments added the qualification that "specific learning disabilities" also excludes those with learning problems primarily resulting from emotional disturbances.

A "free appropriate public education" is special education and related services fulfilling an approved individual education program. Special education includes vocational education (as defined by the Vocational Education Act of 1963, as amended by P.L. 94-482) if it is specially designed to meet the unique needs of the handicapped youth, at no cost to the parents. Among related services EHA's Part B authorizes counseling services and occupational therapy for the handicapped youth, and counseling and training for parents to help them understand their child's special needs.

Rather than list and discuss all the terms included in Subpart A, the authors refer the reader to the definitions in the regulations (42 FR 42478 - 42480), and in Chapter Five of this analysis.

SUBPART B--STATE ANNUAL PROGRAM PLANS AND LOCAL APPLICATIONS

This subpart of the EHA regulations describes a document, called the "State Annual Program Plan," which must be submitted by the State Education Agency (SEA) to the U.S. Commissioner of Education for approval, before the state can receive funds under Part B of the EHA. The plan must include policies and procedures detailing the rights and services that will be extended so that each handicapped youth will have a free and appropriate public education.

In a similar fashion each local education agency (LEA) wishing to receive federal assistance under Part B of the EHA must apply to its state education agency. If the state determines that a public agency is not complying with all the requirements in the application, it may withhold payments.

Since the requirements for the state annual program plan and the local application are similar and since most readers of this overview are expected to be local educators, this overview will focus on the local application. The state plan will only be mentioned when it contains a requirement concerning vocational education for the handicapped that is different from the requirements in the local application.

Preparing and Submitting A Local Education Agency Application. As mentioned above, a local educational agency (LEA) must apply to its state educational agency (SEA) for funds under Part B of the EHA. Each state educational agency establishes the procedures and format the LEA must use. Usually, this information can be found in the state's annual program plan or obtained directly from state educational agency personnel.

Although the LEA is not required to hold public meetings, it must inform parents and the general public that they can inspect and comment on the application and supporting evaluations, reports and documents. The LEA must then review all public comments, and make any necessary changes. After the state educational agency has approved the application, the LEA must inform the public that the approved application is available to any interested person.

The state educational agency may only approve an LEA's application after the U.S. Commissioner of Education has approved the state's annual program plan. In considering approval or disapproval of an application, the state educational agency must be sure that the application meets the requirements of the regulations. Furthermore, if decisions against the LEA have occurred at a due process hearing, the state must consider these before approving the application. After giving notice of a public hearing, the state educational agency may withhold payments from a local educational agency which fails to comply with any requirement in its approved application.

The state educational agency may require two or more local educational agencies to submit a consolidated application if an individual application does not meet certain minimum requirements regarding the amount of its entitled funds or the size and scope of its programs. In addition, LEA's may voluntarily submit consolidated applications in accordance with state educational agency regulations.

Excess cost. Under Part B of the EHA, a local educational agency may only use funds to pay the excess costs of providing special education and related services for handicapped youth. A formula is provided for computing the minimum average amount a local educational agency must spend for educating each of its handicapped youth. Any amount above this minimum may be considered excess cost. Note, however, that secondary students' costs must be computed separately from elementary students' costs. An example for elementary students is given in the regulations (45 CFR 121a.184).

Base these three steps on expenditures from the previous school year.

1. Total what the LEA spent for its secondary school students, including handicapped students.

2. Subtract amounts spent for capital outlay and debt retirement, and for secondary programs for handicapped, educationally deprived, and limited English-speaking students.

3. Then divide by the average number of students--handicapped and nonhandicapped alike--enrolled in the LEA's secondary schools.

This amount is the minimum amount the LEA must spend (on the average) for each handicapped secondary student. This money can come from any local, state or federal funds--except funds from Part B of the EHA (subject to the requirements governing the use of the other funds). If an LEA can show records that it has spent at least this amount, it may then apply to the state educational agency for costs over and above this minimum.

Local Education Agency Application Content. Subparts C, D, E, contain many requirements for services, assurances, policies and procedures which must be included in the LEA's application. These details will be addressed later in this overview. Whenever possible, the appropriate subpart will be referenced in parentheses. The LEA's application can be divided into two areas. We will first look at those elements more closely related to the rights and services which are to be provided for handicapped youth, and then we will consider LEA documents related to funding, administering and reporting on the local program.

Besides being consistent with the EHA, each LEA program must comply with the regulations for Section 504 of the Rehabilitation Act of 1973 (45 CFR 84) concerning nondiscrimination on the basis of

handicap. Among other requirements, this means the local educational agency must make positive efforts to employ qualified handicapped individuals in these programs.

The LEA must describe its procedures for identifying, locating, and evaluating (Subpart E) all handicapped youth within its jurisdiction, regardless of their handicap's severity. These procedures must also include a practical method for determining which youths are receiving necessary special education and related services and which are not. All information which could be linked to an individual must remain confidential.

In addition, each application must include a detailed timetable for providing a "full educational opportunity goal" (Subpart C) for all handicapped children from birth to age 21. Facilities, personnel, and services necessary to meet the goal must be described and the LEA must use the state's personnel development system (Subpart C). In accordance with the regulation's due process provisions (Subpart E), the LEA must provide a free appropriate public education (FAPE) for each handicapped youth by following an individualized educational program (Subpart C). In setting up the timeline, however, the first priority must be given to those handicapped youth who have received no education, and the second priority must be given to those whose education has been inadequate. Records must show that state and local funds are being used to supply comparable services to all handicapped youth and that any funds from Part B of the EHA are only being used for

supplementing existing services and for providing additional services. To provide the least restrictive environment (Subpart E), the LEA must serve handicapped youth in regular educational programs as much as possible. This effort must be documented by listing the available placements and the number of handicapped youth with each impairment being served in each placement.

LEA Documents. The application has several requirements regarding funds, administration and reports (Subpart F and G). All funds received under Part B of the EHA must be used during the next school year and as the regulations specify. Any funds or property bought with such funds must remain under the administration of a public agency. Furthermore, funds can only be used for the excess costs of additional or supplementary services. These Federal moneys are not to be used to replace state or local money.

The local educational agency must keep records and provide any information the state educational agency needs to perform its duties under Part B of the EHA. These reports and self-evaluations must also be accessible to the public. The state annual program plan may make additional requirements to be included in the local application.

Indians may also receive benefits from Part B of the EHA through annual applications by the Secretary of Interior to the Commissioner of Education. The services, procedural safeguards and responsibilities of the Secretary of Interior in providing for handicapped Indian youth

must agree with the regulations.

SUBPART C--SERVICES

This subpart contains regulations concerning the actual services the LEA must provide under Part B of the EHA. These requirements include a free appropriate public education, a full educational opportunity goal, priorities in the use of Part B funds, and individualized education programs. Services provided directly by the state educational agency for educating handicapped youth or for establishing a comprehensive system of personnel development are also regulated by this subpart.

Free Appropriate Public Education. The minimum requirements of Part B of the EHA are described by the legal term, "free appropriate public education" (FAPE), which is defined in subpart A (45 CFR 121a.4). By September 1, 1978, each state must guarantee that handicapped students aged three through eighteen can receive an appropriate education in the public school system. By September 1, 1980 this guarantee must include all handicapped individuals age three through twenty-one. States may, of course, choose to extend these services to children below age three. For handicapped youths aged 3 - 5 and 18 - 21, the regulations require states to offer educational opportunities equal to those they offer students of the same age who are non-handicapped or who have the same disability. If an agency provides education to even one handicapped child from these age groups,

then it must serve that child completely; in other words, with all the protections and services the law provides, at no cost to the parents.

Full Educational Opportunity Goal. Each public agency must have a goal of providing full educational opportunities to all handicapped children in the area it serves, and even though the goal may never be fully achieved, each public agency must take steps toward meeting it. The requirements for special education and related services, however, must be met by certain specified dates, mentioned on page 34. Also, handicapped students must be admitted into the variety of educational options available to nonhandicapped students, including industrial arts, consumer and homemaking education, and vocational education. Furthermore, nonacademic and extracurricular services, such as counseling and referrals to other agencies may also be available, and public agencies may hire handicapped students or help them find outside employment.

Priorities in the Use of Part B Funds. In writing the law, Congress discovered that two groups of handicapped children had the greatest need for Part B funds. The first priority was handicapped children who were not receiving any education even though they were in an age group for which the state must provide education. The second were those children within each disability who were most severely handicapped and were consequently receiving inadequate services. Congress found that there were millions of children in these two groups (Congressional Record--Senate, June 18, 1975,

p. S10961), so they required states to take their first steps toward meeting these children's needs.

According to the regulations, after a state or LEA has located these first priority children and placed them in an interim program, then the agencies may use funds to develop an individualized educational program and meet other requirements for these children. For instance, agencies may determine that in order to provide a free appropriate public education for these first priority children, they will have to increase inservice training and supportive services. These may be funded under Part B.

Until September 1, 1978, an LEA may do the same thing for second priority children and for those not covered by the required age groups described earlier. By September 1, 1978, however, there should be no more second priority children because to receive funds, states will have had to provide for them. However, the state's child find system will continue to identify, locate and evaluate handicapped children who are receiving no services.

Individualized Educational Programs. One tool that Congress has required public agencies to use is the "individualized educational program" (IEP). This tool will help insure that students will receive any education appropriate for their own individual needs. The state educational agency must be sure that public agencies in their jurisdiction have developed and implemented an IEP before providing a

handicapped student with special education and related services. This includes agencies that directly serve students as well as agencies that indirectly serve them through contracts, placements, referrals, or other arrangements.

The IEP's importance is clearly evident in the increased attention it is receiving at inservice training sessions and in the media. Therefore, although we will take another look at IEP's and their implications, the following paragraphs will highlight the regulations dealing with the IEP.

Developing the IEP. Within thirty days after a handicapped student has been evaluated and determined to need special education, the public agency must hold a meeting to develop the student's IEP. Then as soon as possible, it must be implemented, and at least once each year, the IEP must be reviewed for possible revision in a similar meeting. Note, however, that handicapped students who are now receiving special education should already have an IEP in effect.

The regulations specify who should participate in the IEP meetings. These include representatives of the public agency, the student's teachers, and someone who is familiar with the procedures and results of the student's evaluation. If the student will be placed in a private agency, then that agency must also be represented at the meeting.

In addition to these participants, public agencies must be sure that parents are involved when a student's IEP is developed and they must be able to document the steps they took toward involving parents. In other words, the public agency must schedule the meeting to fit the parents' schedule and must hold the meeting where parents can conveniently attend--even if this means the meeting must be held after school hours and away from school buildings. If parents are still unable to attend, the public agency must be able to show that they have provided alternate arrangements, such as including the parents on a conference telephone call. Only after making these documented attempts may public agencies proceed with the meeting. If parents do come, the agencies must do whatever is necessary for parents to understand what is going on, for example, providing transcripts, interpreters or translators. Further protections for the parent and the handicapped students are given in subpart E.

IEP Content. The regulations state the minimal requirements for the content of each student's IEP. These include information about the student's present educational performance, short-term objectives and annual goals, necessary participation in special education and related services, as well as possible participation in regular educational programs, and expected dates for beginning and terminating services. Regulations also include objective criteria and schedules for evaluating whether the short-term objectives are being achieved. After this information has been incorporated in an IEP, the public agency must provide the necessary special education and related

services described in the IEP. The regulations do not, however, hold any agency or person accountable if the student fails to reach the objectives projected in the IEP.

The regulations provide rules which protect the rights of the public agency, teachers, parents and handicapped student. But regulations also specify when the public agency can develop the IEP if parents do not exercise their rights. Thus the IEP helps make a free appropriate public education available to each handicapped student.

Direct Service by the State Educational Agency. If a local educational agency is unable or unwilling to comply with the regulations' full requirements, then the state educational agency must take over their responsibilities. These costs need not adhere to the excess cost requirements. If any money remains from the state's administrative costs under subpart G, then the state must spend this money for handicapped students. However, beginning in the 1978-79 school year the state must match these subpart G funds with nonfederal funds.

Comprehensive System of Personnel Development. In its annual program plan, each state must describe how it plans to train personnel, following a three-pronged development process. First, states must provide inservice training; second, states must insure that the

personnel necessary to fulfill the Act's purpose are qualified (as defined in subpart A); and finally states must distribute information from current educational projects, and adopt it if appropriate.

SUBPART D--PRIVATE SCHOOLS

When a public agency places or refers handicapped students to a private school, these students have all the same rights as other students. In other words these students must have an IEP and must be placed in the least restrictive environment at no cost to the parents. Furthermore, private schools must meet all standards that apply to public schools, and comply with all procedural safeguards (subpart E). If the parents feel that either the public or private educational services are inadequate they may have a due process hearing (subpart E) to resolve their differences. Note, however, that if the parents choose to send their child to a private school when a free appropriate public education is available then the state is under no obligation to pay the child's expenses nor does the state have to assume that the private school complies with EHA's regulations. The state's only obligation is to make a program available that will meet the handicapped student's needs. For further details regarding private schools the reader should consult the regulations and appendices A and B.

SUBPART E--PROCEDURAL SAFEGUARDS

This subpart implements EHA's procedural safeguards for protecting the rights of the public agency, the parent, and the handicapped individual. These include due process procedures for parents and children, protection in evaluation procedures, the requirement for the least restrictive environment, confidentiality of information, and procedures from the Office of Education.

These safeguards are extremely important because each public agency must not only inform parents of their rights and the rights of their children, but must also explain how these rights may be exercised and protected. However, if either the agency or the parents request a hearing each party should be represented by a lawyer. Because legal aid is recommended, this overview will only mention the major procedural safeguards, in order to acquaint readers with possible cause for grievance.

Due Process Procedures for Parents and Children. The regulations require that the public agency protect the rights of parents and children through due process procedures. If necessary, qualified surrogate parents must be assigned to represent the child.

Before a public agency decides to alter a student's educational program, it must notify the parents in writing--and must also do so when it refuses to alter the student's educational program. In this

written notice, the public agency must explain what it proposes or refuses to do for the child, the criteria for its decision, and what safeguards the parents have (under subpart E). The public agency must have written evidence that the parent understands the notice.

In fact, before beginning to evaluate and place the student, the public agency must obtain written consent from the parents and the parents must be fully informed about the consent. In particular, parents must know that the consent is voluntary and may be withdrawn at any time. Parents must have access to the youth's educational records, and may get an independent educational evaluation at public expense if in doubt about the agency's evaluation. This evaluation must be considered in any decision related to the student's education. Furthermore, parents may request a hearing on any matter related to his or her child's education.

A public agency may also initiate a hearing related to the child's education. For example, a public agency may want to defend the appropriateness of its evaluation and thereby halt funds for the parents' second evaluation. Furthermore, when state law allows it, the public agency may initiate a hearing when parents refuse consent.

Hearings must be provided at public expense except for legal representation or witnesses requested by the parent. The public agency must inform the parent of any available free or low cost legal services. Also, hearing officers must be qualified and impartial.

The regulations spell out other details regarding hearings.

Unless either party appeals to the state educational agency for an impartial review, the decision at the hearing is final. Subsequent appeals must be settled in civil court. It must be remembered that grievances may be settled through administrative mediation if both parties agree, thereby avoiding the necessity for hearings. Once either party requests a hearing, however, a final decision must be made and mailed to each participant within 45 days. States have only 30 days to review an appeal.

It should be noted that during any of these procedures the student must remain in his or her present educational placement. If the youth has not been admitted to public school, then the youth must be placed in the public school with the parents' consent, until the proceedings are completed. Of course, schools are allowed to deal in their normal way with emergencies in which students endanger themselves or others.

Protection in Evaluation Procedures. Testing and evaluating a young person suspected of being handicapped normally follows accepted professional testing standards. The student's primary mode of communication must first be determined. The test can not racially or culturally discriminate against the student. Also the test must measure what it claims to measure, as opposed to merely measuring how much the youth's impairment restricts him or her. Therefore, several tests and a multidisciplinary evaluation team, including specialists

in the suspected disability, must be used and all areas related to the suspected disability must be evaluated. It should be noted that the regulations' amendments contain additional procedural safeguards for evaluating students suspected of having specific learning disabilities.

The team of evaluators must write a report of the evaluation. Then the public agency must use the evaluation data to make documented decisions about placing the student in the least restrictive environment, and must develop any necessary IEP's.

Least Restrictive Environment. Each public agency must be sure that handicapped students are educated with nonhandicapped students as much as possible. This means that agencies should first seek to place handicapped students in a regular class with supplementary aids and services, in accordance with their IEP. Only when the handicapping condition is very severe should other placements be considered. These alternatives should be available on a gradual scale to provide for the different levels of special needs which students might have. The state educational agency is responsible for insuring that teachers and administrators know and comply with this effort.

Confidentiality of Information. Agencies which collect, maintain or use personally identifiable information must comply with the confidentiality provisions of these regulations. In addition parents have the right to know what records are being collected, maintained and used by each agency, and can inspect, review, challenge and include

information in their child's records. Furthermore, they must be told who has access to their child's records, and the parent's permission must be given before their child's records are used for anything other than complying with these regulations.

Office of Education Procedures. These regulations govern the notices and hearings for reviewing a state plan, withholding payments or making certain exceptions to the law's fiscal requirements. If state or local agencies are not complying with the law in any way, the Commissioner of Education may withhold funds to the state under Part B of the EHA or from other federal funds within the Commissioner's jurisdiction. However, this withholding can be limited to the programs, projects or specified public agencies which have failed to comply with the regulations.

SUBPART F--STATE ADMINISTRATION

The requirements under this subpart cover the state educational agency's responsibilities, how the states may use funds for administrative costs, and the authorization of the state advisory panel.

State Educational Agency Responsibilities: General. As has been mentioned throughout this overview, the state education agency is responsible for insuring that these regulations are implemented and that educational programs provided by the state's public agencies meet

the needs and protect the rights of handicapped students. This means the state educational agency must monitor and evaluate public agencies, and establish procedures and sanctions to achieve compliance with Part B of the EHA.

Use of Funds. Federal funds for state administration may be used for planning and administering the state annual program plan. These funds may also be used for providing evaluation, compliance, leadership and consulting services to the LEA's. Any remaining funds may be used to provide direct or indirect services for handicapped students.

State Advisory Panel. The state advisory panel on the education of the handicapped must include at least one member from each of the following groups: handicapped individuals, teachers of handicapped children, parents of handicapped children, state and local educational officials, and special education program administrators. Other members may be included.

The state advisory panel should meet as often as necessary to pinpoint unmet needs, assist and comment on the state annual program plan, and submit a public annual report on its activities.

SUBPART G--ALLOCATION OF FUNDS; REPORTS

This subpart closely follows the funding provisions of P.L. 94-142. It also describes the annual reports which the state educational agency must make to the U.S. Commissioner of Education.

Allocations. The regulations describe how federal funds under Part B of the EHA will be made available to each of the states. This formula is based on the average amount spent per public school student in the United States. States will receive a percentage of this average-per-pupil cost, for each handicapped student. Funds are also available for handicapped Indian children and handicapped students in U.S. territorial jurisdictions. Within each state, funds are distributed between the state educational agency and local educational agencies. An LEA will receive funds in proportion to the number of handicapped students it serves. However, if a state finds that the LEA is using other funds to adequately serve the handicapped children within its area, then the state may reallocate the funds to other LEA's which need more money to serve handicapped students.

Reports. In order to substantiate funds, each state educational agency must report the number of handicapped children who are receiving special education and related services according to age groups and disability categories. The states must follow rules for counting handicapped students and must set standards by which local educational agencies must count their handicapped students. The EHA

limits the number of students who may be counted for funding purposes. Even though a state finds it has a higher percentage of handicapped students, it must still provide each handicapped student the opportunity for a free appropriate public education.

SUMMARY

This sweeping legislation is essentially a national special education law charging state and local education agencies with the responsibility of providing a free and appropriate public education for all handicapped children ages 3 - 21. Procedural safeguards such as the following are guaranteed:

- due process procedures
- individual educational programs
- least restrictive environments
- use of nondiscriminatory testing and evaluation procedures
- confidentiality of information

P.L. 94-142 contains several specific provisions directly affecting vocational education of the handicapped. First, in their annual program plans submitted to the U.S. Office of Education, states must insure that funds received under the Vocational Education Amendments of 1976 are consistent with the goal of providing a free and appropriate public education. Since "appropriate education" includes individual education programs (IEP's), handicapped students

enrolled in regular, as well as special vocational schools or classes, will have IEP's. Second, under the full educational opportunity goal, the legislation specifically states that

> ...state and local educational agencies shall take steps to insure that handicapped children have available to them the variety of programs and services available to nonhandicapped children, including...industrial arts, home economics, and vocational education.

Third, the IEP's "...must include a statement of the child's present level of educational performance, including academic achievement... prevocational and vocational skills." If the learner is considered deficient in these skills and needs remediation, specific short-range instructional objectives, time lines, and a measurable criteria evaluating each skill are to be included in the IEP. To facilitate implementing these provisions in vocational preparatory programs, state and local educational agencies must outline comprehensive inservice and preservice training programs. Based on these plans, special education personnel can apply for funds to provide inservice training, follow-up technical assistance, current information on research, and new knowledge about serving the handicapped. Regular educators, vocational educators, career guidance counselors, work-study coordinators, and job placement personnel are also eligible for funds.

4

THE VOCATIONAL EDUCATION ACT OF 1963

AS AMENDED BY

THE EDUCATION AMENDMENTS OF 1976

(P.L. 94-482)

The "Educational Amendments of 1976" (P.L. 94-482), signed by President Ford on October 12, 1976, included a complete revision of the Vocational Education Act (VEA) of 1963. This law reflected a major change in the nation's social and economic awareness by focusing on preparing all students for employment rather than only the best students, as in the past. As such, these laws offered greater opportunities to handicapped and disadvantaged students, who had been excluded from some vocational education programs.

On October 3, 1977, after nearly a year of hearings, reviews, and deliberations, the Office of Education issued the final regulations (42 FR 53822) interpreting and implementing the VEA. Although the regulations may continue to be reviewed and revised, funds are now available for local districts to make these programs accessible.

THE IMPACT OF THE VOCATIONAL EDUCATION ACT ON THE HANDICAPPED

Before summarizing VEA's impact on the handicapped, it must be noted that it can only be fully understood in conjuction with two other laws affecting the handicapped: the 1973 Rehabilitation Act, (Section 504) and the Education of All Handicapped Children Act (EHA). Supplementary information prefacing the regulations mentions not only Section 504, but the 1964 Civil Rights Act as well. The regulations themselves specify how EHA applies. In addition, the VEA programs must agree with the State Manpower Services Councils established under the Comprehensive Employment and Training Act of 1973 (CETA).

According to the regulations, any state wishing to receive VEA funds must submit plans through a state board and advisory committee to the HEW Commissioner of Education, detailing how the state will meet the needs of the employers and of those seeking vocational education. Although covering a wide spectrum of vocational concerns, including the vocational preparation of handicapped students, the VEA gives the state great latitude in distributing funds. Those portions of the law which refer to internal federal administrative matters and to authorizing and appropriating allotments to the states are excluded from the regulations discussed below.

PART A--STATE VOCATIONAL EDUCATIONAL PROGRAMS

With authority from the Vocational Education Act, each state can extend, improve, develop, and maintain vocational education programs with grants which allow the state great flexibility in meeting its population's needs, as well as evaluating how well it has done so. The VEA does require, however, that ten percent of the funds from a basic grant (Subpart 2) and from the money provided for program improvement and supportive services (Subpart 3) must be used for the handicapped. This requirement and others concerning the handicapped will be covered in the following overview of the regulations governing grants to the states (45 CFR 104).

SUBPART 1--GENERAL PROVISIONS AND STATE ADMINISTRATION

The regulations have established certain governing bodies which are directly responsible to the Commissioner of Education for the states' compliance with the law. Among these are the state board for vocational education, the state advisory council, and the corresponding local advisory council. The following sections discuss these governing bodies, and review the paperwork they must submit to the Commissioner of Education. While the regulations grant authority and impose requirements on the state board and advisory council on vocational education, the reader must realize that most of the work is delegated to staff members at the state education agency (under the state Commissioner of Education). In a similar manner the U.S.

Commissioner of Education delegates many duties to employees at the agencies within the Office of Education.

State Board for Vocational Education. Any state that wants VEA funds is required to establish a state board which not only plans and administers programs for the handicapped, but which also accounts for VEA funds to the Commissioner of Education. It is therefore responsible for any VEA-funded programs or services for the handicapped. Note, however, that the EHA requires that designated persons within the state education agency must also supervise all educational programs for the handicapped. This shared responsibility demands cooperation and coordination.

State Advisory Council on Vocational Education. Also required is a state advisory council on vocational education for advising and assisting the state board, for evaluating how well vocational education programs meet the state's employment and training needs, and for responding to requests for technical assistance from local recipients. Among the areas the advisory council must annually evaluate and report on are the educational, vocational, and training needs of the handicapped, as well as how well these needs are being met by vocational training programs, vocational rehabilitation programs, and special education programs. The advisory council must include "one or more individuals who . . . have special knowledge, experience, or qualifications with respect to the special educational needs of physically or mentally handicapped persons."

Local Advisory Council. Each eligible recipient--that is, local education agency or post secondary institution--must have a local advisory council organized either by program area school, community or geographical region. Members must represent the distribution of both sexes and the minorities to be served, as well as local business, industry, and labor interests. Although not required by the regulations, it would be helpful to have someone on the council who is familiar with the special needs handicapped persons have, thus enabling the council to advise the local recipient how to meet these needs.

The local advisory council will serve the eligible recipient by identifying current job needs, as well as by evaluating how well courses and programs can help meet these needs. In addition, the council helps prepare the application to the state board.

The State Paperwork. To receive and maintain VEA funds, a state must work closely with its regional HEW office and must submit a series of documents to the Commissioner of Education in Washington. The state begins this process with an application providing assurances of compliance to federal regulations. Upon approval of the state's general application assurances, the regulations require the Commissioner to review for approval a five-year state plan, an annual program plan, an annual accountability report, and an annual evaluation report. This paperwork, making the state accountable for planning and using federal funds, will be reviewed in the following sections.

The General Application. In the general application, the state must assure the federal government that it will comply to laws relating to federal funding of vocational education. Of the application's 12 assurances, only those relating to programs for the handicapped will be discussed in depth. The assurances include certain requirements which local recipients must fulfill in order to receive state funds, and which are important for local schools to heed because the state distributes funds according to how well these requirements and priorities have been met. The funding agency's highest priority is that students receive preparation for employment. However, potential recipients must bear in mind that federal funds can never replace local or state funds--only supplement them.

In appropriating funds, the state guarantees certain priorities: (1) to programs meeting a previously inadequately met need, (2) to applicants with limited finances, and (3) to programs entailing higher costs, such as for the handicapped. To benefit from these guarantees, applications must show how the potential recipient qualifies.

Local advisory councils and local education and training representatives must help complete the application to involve community members who are aware of local resources and needs. In addition to identifying the vocational needs of potential students (including the handicapped), applications must specify how and to what degree these needs will be met. To insure effectiveness, the

application must also include evaluations of previous programs, and to insure efficiency, the application must describe how VEA-funded programs have been coordinated with other programs. Another far-reaching assurance requires that plans for VEA funds must match the state plan for the EHA: this means that EHA regulations for serving the handicapped apply under the VEA.

The Five-Year State Plan. Although the development of a five-year state plan follows a procedure too lengthy and complicated to be fully explained here, important procedures for gaining information will be covered. It is also important to note that certain sections of the five-year plan deal specifically with programs, services, and activities for the handicapped.

To fully utilize resources and information, the state is required to glean information from a wide variety of people, including representatives from the state advisory council on vocational education, state educational agencies, local school boards, and administrators and teachers, as well as those people who attend required public hearings throughout the state. These people's input on goals, programs, and responsibilities must be reflected and justified in the plan; however, much of the state plan will reflect the applications of local education agencies and post-secondary institutions. For the plan to sufficiently respond to the needs of the handicapped, concerned individuals must take every opportunity to represent their needs while the state plan is being developed,

both on the local and state levels.

In essence, the state plan shows how each program will help prepare students for employment, and more specifically, how each program will fit into a handicapped child's individualized educational program. The plan also shows how vocational programs for the handicapped will comply with the twelve assurances in the general application and with the Education of the Handicapped Act. Plans for special and vocational education must be consistent.

The Fiscal Requirements. According to the regulations, the five-year state plan must specify how federal, state, and local funds will be spent, allowing for the ten percent of the state's federal allotment, which under the basic grant to the state (Subpart 2 and Subpart 3) must be used for half of the excess costs for vocationally educating handicapped persons. In other words, when it costs more to provide vocational education for a handicapped student than for a nonhandicapped student, federal funds can be used to pay up to half of the extra costs, with state or local funds making up the difference. How states may calculate this difference in costs remains an unsettled question. If handicapped students can be integrated into regular vocational classes, the cost of additional facilities and services can be itemized, thus answering both the question of excess costs and the requirement for placing handicapped students in the least restrictive environment. Certain exemplary and innovative programs, and other research programs can be funded by the

federal government, usually covering 50 percent of the costs, but in some instances, covering 100 percent.

The State Annual Program Plan. Each fiscal year, the state must up-date its five-year plan with an annual program plan, following a similar formative process. This annual plan specifies precisely how funds will be appropriated and how current evaluative data will be used to improve programs and meet the state's changing education, training, and employment needs. Thus, handicapped individuals and their advocates have the opportunity to annually express the needs of the handicapped, thereby gaining necessary programs, services, and activities.

The Accountability and Evaluation Reports. At the end of the fiscal year the same people who develop the annual program plan also develop an accountability report to be submitted to the Commissioner of Education. This report parallels the program plan in that it also covers spending and the use of evaluation data; but instead of looking forward, as the program plan does, the accountability report analyzes these topics for the past year, and includes an evaluation of how well the program's goals were met. More specifically, the evaluation studies how effective special programs for the handicapped were, in terms of planning, operation, and student achievement in vocational programs and actual employment.

SUBPART 2--BASIC GRANT

Each state must use federal funds from its basic grant to pay for required programs, but may use any remaining funds to supplement certain expenses--among them the state's cost of administering the five-year and annual program plans, and the eligible recipient's cost of locally administering and supervising vocational education programs authorized by the state plan. Ten percent of the funds from the basic grant (Subpart 2) and from the money provided for program improvement and supportive services (Subpart 3, discussed later) must be used to provide programs, activities, and services for the handicapped.

The following sections describe other programs authorized by the basic grant (Subpart 2). There are three important points, however, that the local educator will want to bear in mind when considering the program. First, the local school or agency must actively apply for these programs as they are not automatically handed out. Second, the state may only appropriate federal funds (and matching state and local funds) for programs already specified in its five-year and annual program plans. Third, in any program receiving federal funds, handicapped individuals must have the same opportunities as nonhandicapped individuals.

Vocational Education Programs. According to the regulations, vocational education programs may include any "organized educational

programs which are directly related to the preparation of individuals for paid or unpaid employment, or for additional preparation (upgrading and retraining) for a career requiring other than a baccalaureate or advanced degree." Under this portion of the VEA, funds may only be used for vocational instruction, including activities in the classroom, shop, field, on the job, through student organizations, or, subject to the law's requirements, in private vocational training institutions, and through apprentice agreement. The state may even fund remedial instruction, if it is necessary before the student can benefit from vocational training. This allows schools to train students to correct any handicap or deficiency keeping them from vocational training and employment.

Energy Education Curriculums. Under the state's basic grant, post secondary educational institutions may apply for funds to train students for coal mining technology and for solar energy applications. Within these two energy areas, the regulations suggest several specific curriculums but leave options open for other emerging needs.

Financial Support for Vocational Education Students. Within communities having a high incidence of dropouts and youth unemployment, the state may assist economically needy vocational students by providing stipends, work-study programs, and cooperative vocational education. Cooperative programs alternate on-the-job training with study in school. Local school districts offering cooperative vocational education programs must give needy students in both public

and non-profit private schools the opportunity to benefit from the program. Work-study programs support part-time employment for economically needy students who remain in good standing and attend school full-time. Stipends may be given to students whose acute financial needs are inadequately met by any other programs or services. Conforming to regulations, the state board, through the eligible recipient, must verify that the student is indeed financially needy and that other programs are failing to meet the student's needs. In addition the eligible recipient must follow specified pay rates, written arrangements with employers, and fiscal responsibilities.

Informed Choice and Placement Programs. The basic grant may be used for those industrial arts programs fulfilling the purposes of the Vocational Education Act--in other words, those which enable students to experience work and thereby make more enlightened choices about employment or further training. The state may also use funds for placement services if other funds and services are inadequate to place students who have successfully completed vocational education programs.

Support Services for Women, Parents, and Homemakers. Eliminating sex bias and stereotyping in employment is a major intent of the Vocational Education Act, which provides counseling, job development, instruction, placement and vocational follow-up services for students preparing for jobs traditionally limited to members of the opposite sex. In order to further facilitate educational opportunities, day care services may be made available for students who are parents.

Construction of School Facilities. The state may use funds from the basic grant to construct secondary or post-secondary vocational schools, or to construct and operate residential vocational schools. These facilities must be located where they are available to all area residents, must be accessible to handicapped persons, and must admit all students--whether they have graduated from high school or not.

SUBPART 3--PROGRAM IMPROVEMENT AND SUPPORTIVE SERVICES

Each state must use at least twenty percent of the funds available under Subpart 3 to support vocational guidance and counseling programs, services, and activities. The remaining funds may be used for improving programs, training personnel, overcoming sex bias and stereotyping, and administering and supervising vocational education. As in the basic grant (Subpart 2), fund usage must parallel the state's five-year and annual plans. It must also include opportunities for handicapped individuals, conform with the Vocational Education Act's purposes and priorities and, if not directly operated or contracted by the state, result from an eligible recipient's application (that is, from a local education agency or post-secondary educational institution).

Program Improvement. Funds for improving programs may support research, curriculum development, and exemplary and innovative programs. If a state intends to use funds for improving programs, the state must

establish a research coordinating unit which will be responsible for following procedures and priorities set by the state board, and for publicizing how the programs were improved. The research coordinating unit may use its own staff or may contract for necessary activities.

Research programs may include experimental, applied, developmental and pilot programs, and may study vocational education, test the effectiveness of research findings, improve curriculum, and investigate new career areas. Exemplary and innovative programs may help meet the vocational education needs of urban and rural youth with academic and socio-economic disadvantages, thus broadening their occupational aspirations and opportunities.

Vocational Guidance and Counseling. Each state must use some of the federal funds allotted for program improvement and supportive services to improve the state's vocational guidance and counseling programs, including those which serve the special needs of out-of-school individuals such as the handicapped. Regulations especially emphasize bringing individuals with work experience into the schools to advise and counsel students, but they also emphasize providing, students and counselors the opportunity to gain experience in business, industry, and professional occupations.

Vocational Education Personnel Training. The state may use funds for program improvement and supportive services to improve the qualifications of vocational education teachers, administrators,

supervisors, and guidance counselors. Pre-service or in-service training may include improving instruction, supervision and administration of vocational education for persons who are handicapped. At its option, the state may pay stipends and expenses for trainees and their dependents.

Grants to Overcome Sex Bias and Sex Stereotyping. In accordance with one of the VEA's main priorities, the state may use funds to eliminate sex discrimination by conducting research, for example, or by developing and evaluating curriculum, and training personnel. Those seeking funds under this law should not overlook the opportunity to overcome sex bias and stereotyping while training and employing handicapped individuals.

SUBPART 4--SPECIAL PROGRAMS FOR THE DISADVANTAGED

In addition to money available under Subparts 2 and 3, the Vocational Education Act authorizes separate funds for special programs for the disadvantaged. While the definition of "disadvantaged" given in the regulations excludes handicapped persons, special programs for the academically disadvantaged may serve students who fail to receive necessary vocational services under the VEA's definition of "handicapped." Also, students enrolled in non-profit private schools must be given the opportunity to participate in these programs.

SUBPART 5--CONSUMER AND HOMEMAKING EDUCATION

The Vocational Education Act authorizes separate funds for consumer and homemaking education which is extremely important for handicapped persons who may not have picked up these skills at home. Funds will only be provided for programs in which the eligible recipients are encouraged to provide outreach programs for all educational levels, including young children, adults, and handicapped persons.

PART B-COMMISSIONER'S DISCRETIONARY PROGRAMS OF VOCATIONAL EDUCATION

From the 1963 Vocational Education Act, "Part B-National Programs" is interpreted and implemented by Part 105 of the regulations (45 CFR 105). For each program the regulations describe the purposes, the authorized activities, the eligible applicants, and the application and review procedures. These descriptions may differ from those in the state vocational education programs. In response to announcements in the "Commerce Business Daily," which lists each "Request for Proposal" (RFP), eligible recipients may send for the application materials and technical review criteria and apply directly to the office designated by the Commissioner of Education. Programs of national significance include grants and contracts for program improvement, assistance contracts for Indian tribes, training and development programs for vocational education personnel, emergency assistance for remodeling and renovating vocational education facilities, and

bilingual vocational education. Except for the remodeling and renovating assistance, the Commissioner may pay the costs for all or part of any of these projects; no cost sharing is required.

SUBPART 1 - PROGRAM IMPROVEMENT

The Commissioner of Education will support nationally significant projects designed to improve vocational education. The projects authorized under these regulations are almost identical to those authorized under the grants to the states for program improvement and supportive services. However, national projects may last a maximum of three years. The authorized projects include research, exemplary and innovative programs, curriculum development, vocational guidance and counseling, vocational education personnel training, and grants to assist in overcoming sex bias and stereotyping. An additional project area not included in state grants involves converting vocational curriculum used by the U.S. Armed Forces for use in schools and other public agencies. Individuals, public and private organizations, institutions, and agencies can apply for these projects.

The Commissioner of Education will also support a national center for research in vocational education; however, only non-profit agencies may be awarded the contract for the national center for research in vocational education. Chosen once every five years, the current center is located at The Ohio State University. Among the center's responsibilities are applying and developing research, developing

leadership and in-service education, developing and distributing information, and cooperating with schools and other public agencies in evaluating programs and conducting follow-up studies. In its role as a clearinghouse for state and federal vocational education projects, the national center is a logical resource for the latest information on vocational education for handicapped individuals.

SUBPART 2--INDIAN TRIBES

An Indian tribe may request a contract from the Commissioner of Education to plan, conduct, and administer programs consistent with the Vocational Education Act. Any contract entered into under this subpart must also be consistent with the "Indian Self-Determination and Education Assistance Act of 1975," (P.L. 93-638) and the applicable regulations.

SUBPART 3--TRAINING AND DEVELOPMENT PROGRAMS FOR VOCATIONAL EDUCATION PERSONNEL

The Commissioner will grant awards and fellowships to several groups of educators. The awards for graduate school leadership are awarded to persons who have had at least two years' experience in vocational education, training or research. Teachers certified in other fields as well as people in industry, business and agriculture who wish to enter understaffed areas of vocational education can receive fellowships for receiving their certification in vocational

education. In addition to stipends provided to individual recipients and their dependents, the Commissioner of Education pays an institutional allowance for replacing tuition and fees and for program improvement. To receive this allowance institutions must offer a comprehensive program in vocational education with adequate supporting services for the handicapped.

SUBPART 4--EMERGENCY ASSISTANCE FOR REMODELING AND RENOVATING OF VOCATIONAL EDUCATION FACILITIES

Any urban or rural local education agency may remodel or renovate its vocational education facilities and equipment to modernize a program, thus giving reasonable promise of employment to its students. After ranking applications according to their relative need for assistance, the Commissioner of Education will usually pay 75 percent of the expense for approved projects until the appropriated money is exhausted. However, the commissioner may pay more than 75 percent if a local agency is in extreme financial need.

As with other federally assisted construction, the remodeling and renovating must meet standards complying with the Architectural Barriers Act, and the site or location must comply with federal non-discriminatory laws. Thus, while modernizing facilities to meet new employment needs the local education agency can make facilities and equipment accessible to handicapped individuals.

SUBPART 5--BILINGUAL VOCATIONAL EDUCATION

Bilingual vocational training programs are available for unemployed persons who are no longer in school and for employed persons who have, want, or need training. The Commissioner of Education also provides funds for training instructors and developing and researching curriculum. No funds are available under subpart 5 for bilingual programs for secondary students.

SUMMARY

Title II of the Education Amendments of 1976 (P.L. 94-482) introduces new federal funding requirements for vocational education programs. Since the 1968 Amendments to the Vocational Education Act of 1963, states have been required to spend at least 10% of their basic state grant for vocational education programs and services for the handicapped. This was often done in special vocational education programs segregated for the handicapped. The new 1976 Amendments continue the 10% setaside, but now require 50% matching of state and local funds. Since most states were not equally matching these funds in the past, the total dollars available for vocational education for the handicapped will increase considerably. Furthermore, the federal and matching state and local funds may only be used to pay the excess costs of educating a handicapped student. In other words, if having a handicapped student in a class requires an extra piece of machinery costing $100, federal funds will pay $50 and state or local

funds, $50. In addition, the 1976 Amendments require the full availability of regular vocational educational options for handicapped students.

The Act also requires the state to assure, in writing, that the Five-Year and Annual Program Plans are consistent with the state plan for education of the handicapped. This means that all of the procedural safeguards and assurances from P.L. 94-142 will be extended to handicapped learners served under the Vocational Education Act. Previously, only a limited number of students identified as "handicapped" and enrolled in vocational education programs were also identified and served in special education programs. This assurance clause should greatly enhance the consistency of curriculum objectives and individualized instruction efforts between vocational and special educators.

5

COMPARING THE REGULATIONS: DEFINITIONS, ISSUES AND IMPLICATIONS

In this chapter the authors discuss how the preceding three laws apply to several topics including individual education programs, funding, definitions of "handicapped," and other topics. In addition to noting how the three laws can help handicapped individuals, readers should be aware that the laws are internally bound together such that, if funding is sought under one law, provisions must be made for the other two. Several of the topics--for example, funding--actually span entire laws, rather than just the cited sections.

The discussion of each topic (1) lists the major sections dealing with the topic, (2) reviews what each law says about the topic, and (3) suggests how each topic will affect the vocational teacher of a handicapped student. The major sections dealing with each topic are listed under abbreviated titles of the law: "504" refers to Section 504 of the Rehabilitation Act of 1973 (P.L. 93-112); "EHA" refers to the Education of the Handicapped Act, as amended by the Education for All Handicapped Children Act of 1975 (P.L. 94-142); and "VEA" refers

to the Vocational Education Act of 1963, amended by the Educational Amendments of 1976 (P.L. 94-482). These sections are cited for the readers' convenience in pursuing further information. Other sources are the supplementary information and comments included in the regulations, as well as the persons listed on the first page of that part of the Federal Register. These people have been a great help to the authors in tracking down elusive points of the law. However, questions concerning local and state implications are often best directed to the information officers at the agency involved. In addition to providing information, the format of these discussions could serve as a model for research into additional topics.

DEFINITION: HANDICAPPED

504	EHA	VEA
84.3(j), (k) & (l)	121a.5	Appendix A

Both P.L. 94-142 and P.L. 94-482 concur with the definition of "handicapped" as described in the 94-142 regulations (45 CFR 121a.5(a)), which is as follows:

> ...those children (appropriately) evaluated as being mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, other health impaired, deaf-blind, multi-handicapped, or as having specific learning disabilities, who because of those impairments need special education and related services.

Exact legal definitions for these terms can be found in the regulations (45 CFR Section 121a5(b)).

1. DEAF: a hearing impairment so severe that it adversely affects students' performances because they find it difficult to process linguistic information with or without hearing aids.

2. DEAF-BLIND: simultaneously occurring hearing and visual impairments, which cause such severe communication, developmental, and educational problems for students, that they cannot be accommodated in special education programs solely for deaf or blind students.

3. HARD OF HEARING: a permanent or fluctuating hearing impairment, which adversely affects students' educational performances but which is not included under the definition of "deaf" in this list.

4. MENTALLY RETARDED: significantly subaverage general intellectual functioning existing simultaneously with deficits in adaptive behavior, manifested during the development period, and adversely affecting a student's educational performance.

5. MULTIHANDICAPPED: simultaneously occurring impairments, such as mentally retarded-blind, or mentally retarded-orthopedically impaired, which cause such severe educational problems for students that they cannot be accommodated in special education programs for only one of the impairments. The term does not include deaf-blind students.

6. ORTHOPEDICALLY IMPAIRED: a severe orthopedic impairment which adversely affects a child's educational performance. The term includes impairments caused by congenital anomaly (e.g., clubfoot, absence of some member, etc.), impairments caused by disease (e.g. poliomyelitis, bone tuberculosis, etc.), and impairments from other causes (e.g., cerebral palsy, amputations, and fractures or burns which cause contractures).

7. OTHER HEALTH IMPAIRED: limited strength, vitality, or alertness, due to chronic or acute health problems such as a heart condition, tuberculosis, rheumatic fever, nephritis, asthma, sickle cell anemia, hemophilia, epilepsy, lead poisoning, leukemia, or diabetes, which adversely affects a child's education performance.

8. SERIOUSLY EMOTIONALLY DISTURBED:

   A. A condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree, and adversely affecting educational performance

      (1) An inability to learn which cannot be explained by intellectual, sensory, or health factors;

      (2) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;

      (3) Inappropriate behavior or feelings under normal circumstances;

      (4) A general pervasive mood of unhappiness or depression; or

      (5) A tendency to develop physical symptoms or fears associated with personal or school problems.

   B. The term includes students who are schizophrenic or autistic, but excludes students who are socially maladjusted, unless it is determined that they are seriously emotionally disturbed.

9. SPECIFIC LEARNING DISABILITY: a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written; manifesting itself in an imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations. The term includes such conditions as perceptual handicaps, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia; but excludes students who have learning problems which primarily result from visual, hearing, or motor handicaps, from mental retardation, or emotional disturbance, or from environmental, cultural, or economic disadvantage.

10. SPEECH IMPAIRED: a communication disorder, such as stuttering, impaired articulation, a language impairment, or a voice impairment, adversely affecting a student's educational performance.

11. VISUALLY HANDICAPPED: a visual impairment which, even with correction, adversely affects a student's educational performance. The term includes both partially seeing and blind children.

Section 504 of the Rehabilitation Act of 1973 presents an even broader definition that includes any person who has a physical or mental impairment which substantially limits one or more major life activities; such as, the functions of caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

DEFINITION: SPECIAL EDUCATION AND VOCATIONAL EDUCATION

504	EHA	VEA
	121a.14	104.511 104.512 Appendix A

The term "special education" is defined in the regulations for P.L. 94-142, Section 121a.14, as meaning specially designed instruction to meet the unique needs of a handicapped student, including vocational education, if it consists of specially designed instruction, at no cost to the parents, to meet the unique needs of a handicapped student. P.L. 94-142's definition of vocational education is directly from the Vocational Education Act of 1963, as amended by P.L. 94-482, which reinforces this concept in Section 104.312 where it states that

> ...the State shall expend at least 10% of the allotment under section 102 (a) of the Act for vocational education for handicapped persons...and shall use these funds to the maximum extent possible to assist handicapped persons to participate in regular vocational education programs.

Subpart D of Section 504 supports the concept of vocational education for the handicapped when it sets forth the requirements for nondiscrimination in preschool, elementary, secondary, adult education programs and activities, "including secondary vocational educational programs" (p.22690 of final regulations).

Both 94-142 and 94-482 define vocational education as organized educational programs directly related to preparing individuals for paid or unpaid employment, or for additional training for a career requiring other than a baccalaureate or advanced degree. It includes industrial arts and consumer and homemaking education programs.

IMPLICATIONS:

It is important to note that existing handicapping conditions do not automatically make a person eligible for special education. The handicapping condition must adversely affect the student's chance for success in a regular, vocational, industrial arts, consumer, or homemaking educational program, thus necessitating special educational assistance or a modified program. This implies that a "cause and effect" relationship must exist before a handicapped person can be considered in need of special services: the cause must be a handicap, and the effect must be an inability to succeed in a regular or vocational class due to that handicap.

Placement should be determined only after considering the student's unique needs and abilities. Both the special and vocational education regulations require that, to the maximum extent possible, handicapped persons will be educated with non-handicapped persons. Students with similar handicapping conditions should not be placed in programs together and be considered as having similar needs.

The following considerations should be reflected when determining which handicapped individuals are eligible for special education and related services:

1. Does the student have a handicapping condition which severely affects his/her educational performance?
2. If special educational assistance or a modified program were provided, could a student identified as having a handicapping

condition which severely affects his/her educational performance succeed in a regular, vocational, industrial arts, consumer, or homemaking education program?

3. Has the State Department of Education established standards for determining which handicapped students require special education and related services?
4. Is placement determined only after considering the student's unique needs and abilities of the student?
5. Is caution used by local education agencies so that students with similar handicapping conditions are not placed in programs together and considered to have similar needs?
6. Have both the state and local agencies established a policy to insure that to the maximum extent possible, handicapped persons will be educated with nonhandicapped persons?

NATIONAL, STATE AND LOCAL ADVISORY COUNCILS

504	EHA	VEA
84.4(b)(vi)	121a.147	104.91-104.97
84.6	121a.650-121a.653	104.111-104.112
84.7		104.141(f)(4)(A)
		104.162(j)
		104.403(b)

Section 121a.651 of the EHA regulations require each state to establish a state advisory panel on the education of handicapped individuals. It is to be appointed by the Governor and composed of persons involved in and concerned with the education of handicapped children. Its membership should include at least one representative of each of the following groups:

1. Handicapped individuals
2. Teachers of handicapped students
3. Parents of handicapped students
4. State and local educational officials
5. Special education program administrators

The composition and the number of members may be expanded at the discretion of the state. The panel's functions are described in section 121a.652 as follows:

1. Advise the state educational agency of handicapped students' unmet needs
2. Publicly comment on the state annual program plan and the rules or regulations proposed for issuance by the state regarding the education of handicapped students, and the procedures for distribution of funds;

3. Assist the state in developing and reporting on evaluations that may assist the Commissioner to perform his responsbilities.

The regulations to the Vocational Education Act mandate national, state, and local advisory councils in Sections 104.91 - 104.112. The State Advisory Council must include one or more individuals who have special knowledge, experience or qualifications with respect to the educational needs of physically or mentally handicapped persons.

The functions of the State Advisory Council include:

1. Advising the organizations responsible for administering policy matters on vocational education.
2. Identifying vocational and training needs and assessing the extent to which vocational education, special education, vocational rehabilitation and other agencies represent a consistent, integrated, and coordinated approach to meeting these needs.
3. Conducting at least one public meeting each year, thus giving the public an opportunity to express views concerning the state's vocational education program.
4. Evaluating how well the programs, services, and activities carried out in the year met the program goals.
5. Recommending necessary changes in programs, services, and activities based on the results of its evaluation.

Local advisory councils must advise vocational education administrators of current job needs and the relevance of programs being offered to meet these needs.

Section 504 of the Rehabilitation Act of 1973, in regulation Section 84.4(b)(vi) stipulates that no qualified handicapped person shall be denied the opportunity to participate as a member of planning or advisory boards.

IMPLICATIONS:

The advisory panels required by P.L. 94-142 and P.L. 94-482 have similar missions. The state advisory panels required by both acts include functions which relate to

(1) advising the program administrators on the students' needs
(2) advising on policies and programs being developed to meet the students' needs, and
(3) assisting in developing and reporting on evaluations conducted to determine the effectiveness of programs, services, and activities in meeting program goals.

Given the similarity of missions and commonality of goals, the state advisory councils should coordinate their efforts to insure total coverage of all educational programs for the handicapped.

Having handicapped individuals on the state and local advisory councils should be seriously considered. Although their participation on advisory councils is not mandated, they could give the councils

immediate input and advice for meeting needs of the handicapped.

1. Does the State Advisory Council advise the organizations responsible for administering policy matters relating to the handicapped?
2. Does the State Advisory Council identify the vocational needs of the handicapped?
3. Does the State Council assess how well vocational education, special education, vocational rehabilitation and other agencies represent a consistent, integrated, and coordinated approach to meeting these needs?
4. Is at least one meeting each year open to the public thereby giving them an opportunity to express views concerning the state's vocational education program as it relates to the handicapped?
5. Does the State Council evaluate how well programs, services, and activities carried out in the year meet the program goals for the handicapped?
6. Does the State Council recommend necessary changes in programs, services, and activities for meeting the needs of the handicapped?
7. Does the Council advise the local administrators of vocational education about current job needs and the relevance of programs being offered to meet those needs?
8. Are representatives of the handicapped included on the local advisory council for vocational education and the local advisory panel for the education of all handicapped students?

9. Does the state have an advisory panel for the Education of All Handicapped Students on which there is a representative of vocational education?
10. Does the state have an Advisory Council for Vocational Education on which both special educators and the handicapped are represented?

EDUCATIONAL PLACEMENT IN THE LEAST RESTRICTIVE ENVIRONMENT

504	EHA	VEA
84.4(b)(iv) & (vii)	121a.132	104.312
84.11(a)(3)	121a.227	
84.12	121a.305-121a.307	
84.22	121a.361	
84.34	121a.513	
84.37.(b) & (c)	121a.550-121a.556	
84.43(d)		
84.47(b)		

Sections 121a.550-121a.556 of the regulations implementing P.L. 94-142 require the State Education Agency to insure that all the requirements for the least restrictive environment are met. Each educational agency in the state shall insure

1. that handicapped students are educated with nonhandicapped students in public or private schools or care facilities to the maximum extent possible and appropriate to the needs of the students;
2. that special classes, separate schooling, or other removal of handicapped students from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

Each educational agency in the state is responsible for each handicapped student's educational placement. The placement is

1. determined annually, or more frequently
2. based on his or her individualized education program, and
3. located as close as possible to the child's home.

Each educational agency in the state shall insure that handicapped students participate with nonhandicapped students in nonacademic and extracurricular services and activities to the maximum appropriate extent. The state is responsible for insuring that 121a.550-121a.556 is implemented by each educational agency in the state.

Section 84.34, of the regulations for Section 504 of the Rehabilitation Act of 1973, requires the state to provide for the education of each qualified handicapped person in its jurisdiction, and to place each handicapped person in a regular educational environment unless it can demonstrate that this cannot be achieved satisfactorily even with the use of supplementary aids. When the state places a person in a setting other than the regular educational environment, it shall take into account the alternate setting's proximity to the person's home.

Section 84.34 requires the state education agency to also provide handicapped persons with nonacademic services in as integrated a setting as possible even in residential settings.

Section 104.312 regulations, implementing P.L. 94-482, require the state to spend at least 10 percent of the funds appropriated under Section 110(a) of the Act for preparing handicapped persons for jobs in the "least restrictive environment."

Looking at the texts of the laws as passed by Congress, section 110(a) of P.L. 94-482 must be consistent with section 613(a) of P.L. 94-142. The statutory requirements on "least restrictive environment" are binding on Section 110(a) of the Vocational Education Act. Vocational education programs for handicapped persons must be planned and coordinated in conformity with and as a part of the student's IEP.

IMPLICATIONS:

When planning programs for the handicapped and placing them in vocational education, the following questions should be considered:

1. Can the educational agency document the attempts made to place the handicapped individual in regular vocational programs with support services?
2. Can the educational agency describe the nature and severity of the handicap which prohibits the student from participating in regular vocational education with supplementary aids and services?
3. Is the handicapped student unable to participate in the regular program because facilities are inaccessible?
4. Are alternative placements available for handicapped students who cannot participate in regular vocational programs?
5. Are the facilities, services, and activities for handicapped students in separate programs comparable to those provided in the nonhandicapped programs? Comparability in this instance would mean equal opportunity for benefits and services.

INDIVIDUALIZED EDUCATION PROGRAM

504	EHA	VEA
84.33(b)(2)	121a.4 121a.130 121a.235 121a.322 121a.340-121a.349 121a.401 121a.533-121a.534 121a.552	104.182(f)

Sections 121a.340-121a.349 of P.L. 94-142 require the State Education Agency to insure the development and implementation of an Individualized Education Program (IEP) for each of its handicapped students.

Each educational agency in the state is responsible for initiating and conducting meetings for developing, reviewing, and revising the handicapped student's IEP. Participants must include:

- a representative of the public agency, other than the student's teacher, who is qualified to provide or supervise the provision of the special education services
- a representative of the private school or facility, if this private agency is involved
- the student's teacher
- one or both of the student's parents
- the student, where appropriate
- other individuals representing the student's initial evaluation, if a new student
- other individuals at the discretion of the parent or agency.

The IEP for each student must include the following information:

(1) A statement of the student's present levels of educational performance,

(2) A statement of annual goals, including short term instructional objectives,

(3) The specific special educational and related services to be provided and the extent to which the student will be able to participate in regular educational programs,

(4) The projected dates for beginning services and their anticipated duration,

(5) Appropriate objective criteria for evaluating and schedules for determining, at least annually, whether the short term instructional objectives are being achieved.

Section 104.182(f) of P.L. 94-482 requires the State Education Agency to insure that funds for vocational programs for the handicapped parallel the State Plan submitted under the Education for All Handicapped Children Act, P.L. 94-142. Each handicapped student's program must be planned and coordinated as a part of the student's IEP as required by P.L. 94-142.

Section 504 of the Rehabilitation Act of 1973 requires each recipient of federal funds to provide an education which includes services designated to meet a handicapped persons' individual needs as adequately as nonhandicapped persons' needs are met. According to the regulations an IEP will meet the requirement.

IMPLICATIONS:

The Individual Education Program documents the handicapped student's free appropriate public education. Vocational educators must coordinate their roles and relationship with other educators developing and implementing components of the student's IEP.

The student's present performance should be based on vocational assessments, as well as competencies gained in previous career development, exploration and prevocational experiences. The vocational educator, special educator, parents, and very often the student should be setting the goals and short-term objectives for the IEP.

An important task for the vocational educator is to define those activities the handicapped student will be participating in and identify the support services needed to carry out these activities in regular vocational programs.

Special educators should be providing the necessary prerequisite activities enabling handicapped students to more fully benefit from vocational education. Such activities are to be provided for each handicapped student, regardless of age or the severity of their handicapping condition. IEP's should demonstrate these goals and objectives.

1. Does the IEP document the handicapped student's free appropriate public education?

2. Does the IEP show that vocational educators and other educators cooperated regarding the student's vocational assessment and goals?
3. Does the handicapped student's record or IEP show competencies previously gained in career development, exploration, and prevocational experiences?
4. Is it obvious from the student's IEP, that parents, special education, and vocational education have worked together in formulating the student's goals and short term objectives?
5. Has the vocational educator defined the activities which the handicapped student will be participating in and the necessary support services?
6. Are special educators (K-12) including appropriate career development activities which enable handicapped students to benefit more fully from vocational education?
7. Are special educators providing the necessary support services for handicapped students enrolled in regular vocational classes, as defined by the vocational educator in the student s IEP?
8. Do IEP's for all handicapped students identify appropriate career development goals and objectives?

PERSONNEL DEVELOPMENT

504	EHA	VEA
	121a.126	104.603
	121a.139	104.701(c)
	121a.223-121a.224	104.763(d) & (h)
	121a.321-121a.322	104.771-104.776
	121a.370	
	121a.380-121a.387	
	121a.532	
	121a.555	
	121a.572	

Sections 121a.380-121a.387 of the regulations implementing P.L. 94-142 require the State Education Agency to insure the development and implementation of personnel development, including the inservice training of general (including vocational) and special education, instructional, related services, and support personnel. States must insure that ongoing inservice training programs are available to all personnel who are engaged in the education of handicapped students.

Section 104.771-104.776 requires that in order to be eligible for funds under Section 130 of P.L. 94-482, the state must establish specific programs and projects of training in accord with the general plan for training vocational educational personnel as set forth in the approved five-year state plan and annual program plan for vocational education. Training may be provided to persons serving or preparing to serve in vocational education programs; including teachers, administrators, supervisors, and vocational guidance and counseling personnel.

The State Education Agency is responsible for using funds under Section 130 of P.L. 94-482 to support programs and projects for improving the qualifications of the above listed persons through training and in-service training thereby improving instruction, supervision and administration of vocational education for handicapped persons.

Section 84.33(b) of the regulations for Section 504 of the Rehabilitation Act require that the quality of the education services provided to handicapped students must equal that of the services provided to nonhandicapped students. Thus, the state must train teachers with handicapped students in their classes how to teach students with those handicaps.

IMPLICATIONS:

A recent General Accounting Office (GAO) report noted specifically that little has been done nationally to train vocational educators to work with the handicapped. The report recommended that the appropriate bureaus within the U.S. Office of Education collectively develop and implement a plan to provide teacher training in this area. Similar efforts are needed at the state and local levels.

There is also a major need for training special education personnel to provide teachers of the handicapped with necessary

skills to implement career development curricula at all levels of special education. Handicapped students, regardless of their age or the severity of their handicapping condition, should have sequenced activities directed toward developing entry level skills to obtain maximum benefit from vocational education.

When developing plans for preparing personnel to serve handicapped students in vocational education, the following specific considerations should be made:

1. Has a needs assessment been developed to determine the specific nature and extent of preservice and inservice training needed for administrative, leadership, instructional, and support personnel involved in vocational education programs serving handicapped students?
2. Has a needs assessment been conducted to determine the nature and extent of inservice and preservice needs of special educators to implement sequenced career development curricula at all levels of special education?
3. Are plans underway to coordinate these preservice and inservice activities in such a way that resources available from both special education and vocational education can be utilized?
4. Do the resources include both the personnel and the activities which are part of the comprehensive plan directed toward improved vocational training for handicapped students?

STATE STANDARDS FOR EDUCATING THE HANDICAPPED

504	EHA	VEA
	121a.110-121a.114	104.5
	121a.120-121a.151	104.32(b) & (c)
	121a.280-121a.284	104.93
	121a.320-121a.323	104.141
	121a.500-121a.514	104.161.-104.165
	121a.530-121a.534	104.171
	121a.550-121a.556	104.181-104.188
	121a.580-121a.583	104.202-104.207
		104.221-104.222
		104.261-104.263
		104.271
		104.281-104.293
		104.302
		104.502(c)(13)

In P.L. 94-142 state standards for educating the handicapped are detailed in Section 121a.120-121a.151 of the regulations. Any activity in the state to educate handicapped students must meet all the State Education Agency's standards for educating handicapped students. The following are basic state standards:

1. The state plan must demonstrate a policy assuring all handicapped students the right to a free appropriate public education within the specific age range. Timelines for implementing a free appropriate public education are indicated in Section 121a.122.
2. The state plan must include policies and procedures to insure a goal of providing full educational opportunity to all handicapped students. The timetable for accomplishing this goal is given in 121a.125.
3. Each annual program plan must describe the facilities, personnel, and services necessary to give a free appropriate

public education to all handicapped students.

4. The state annual plan must show that the state has established priorities in accordance with the definitions presented in sections 121a.320-121a.323. The "first priority" are those handicapped students in an age group for which a free appropriate public education is required, but still nonexistent; and the "second priority" are those handicapped students with the most severe handicaps within each disability, who are receiving an inadequate education. The state plan must also reflect the timelines for the above priorities and the progress in meeting those timelines.
5. Each annual plan must detail the policies and procedures which the state will undertake to identify, locate, and evaluate all handicapped students needing special education and related services; and to determine which students are currently receiving necessary special education and related services, and which are not.
6. Policies and procedures must protect the confidentiality of any information that can be personally identified.
7. The state must show that each public agency in the state establishes, reviews, and revises each individualized education program annually.
8. Procedural safeguards must be included in the state plan to insure due process procedures for parents and handicapped youth:
   a. Parents' rights to review all records of the handicapped child. 121a.502

b. Parents' rights to obtain an independent educational evaluation of the child, if necessary, at public expense.

c. Parents' rights to a written notice, before the public agency either initiates a change in the identification, evaluation, or educational placement of the student or the provision of free appropriate public education, or refuses to initiate a change in the identification, evaluation, or educational placement of the student or the provision of free appropriate public education.

d. Parents' rights to a written notice explaining all procedural safeguards available to the parents, as well as describing the action proposed or refused by the agency. The agency should describe any options and explain why those options were rejected. If applicable, the agency should also describe each evaluation procedure, test, record, report or other factor the agency uses as a basis for the proposal or refusal, use language understandable to the general public and, if necessary, translate to the parents' native language or mode of communication.

e. A parent or a public educational agency may initiate a hearing on any matter, which must be conducted by the state educational agency or the public agency directly responsible for the child's education. In such case, the public agency must inform the parent of any free or low-cost legal and other relevant services available,

whether the parent or the agency initiated the action.

f. The due process hearing must be conducted by an impartial hearing officer, not by an employee of the public agency involved in educating or caring for the handicapped student.

g. The following are the sections to refer to for specific information in regard to

(1) Hearing rights - 121a.508

(2) Hearing decision; appeal - 121a.509

(3) Administrative appeal; impartial review - 121a.510

(4) Civil action - 121a.511

(5) Timelines and convenience of hearings and reviews 121a.512

(6) Child's status during proceedings - 121a.513

(7) Surrogate parents - 121a.514

9. The state annual plan must insure that materials and procedures for evaluating and placing handicapped students are selected and administered so as not to be racially or culturally discriminatory (121a.530) and must be in the student's native tongue or mode of communication (121a.532). Also, before a student is placed in a special education program, a full and individual evaluation of a child's educational needs must be conducted (121a.531). The regulations for interpreting evaluation data and in making placement decisions are in 121a.553. Each handicapped student's IEP must be annually evaluated and a full

evaluation completed at least every three years. 121a.534

10. Each state education agency shall insure the least restrictive environment for all handicapped students so that to the maximum appropriate extent handicapped students in public or private facilities are educated with children who are not handicapped and that special classes, separate schooling, or other ways to remove handicapped students from the regular educational environment occurs only when their handicap is such that education in regular classes cannot be achieved satisfactorily, even with the use of supplementary aids and services. A continuum of alternate placements must be available to meet the needs of the handicapped students for special education and related services. Each public agency shall insure that a handicapped student's educational placement is determined annually, is based on his or her individualized education program, and is as close as possible to the student's home. The various alternative placements included under section 121a.551 must be available to the extent necessary to implement the individualized education program for each handicapped student.
11. Each public agency shall insure that a handicapped student participates as much as is appropriate with nonhandicapped students in all services and activities.
12. Each state educational agency shall insure that teachers and administrators in all public agencies are fully informed about their responsibilities for placing handicapped students in the least restrictive environment, and are provided with necessary technical assistance and training.

13. The state educational agency shall insure that each public agency implements the least restrictive environment and shall conduct appropriate monitoring activities. 121a.556
14. The state is responsible for insuring and effectively implementing procedural safeguards for the handicapped students it serves. 121a.136
15. Each annual program plan must include an assurance that according to the requirements for section 612 of the Act, procedures are established for consultation with individuals concerned with educating handicapped students; including handicapped individuals and parents of handicapped children.
16. Each state must insure that funds from the state or any public agency in the state under any other federal program, are used consistently with the goal of providing free appropriate education for all handicapped students.
17. A comprehensive system of personnel development must be included in the state plan. 121a.139
18. Private schools - 121a.140
19. Recovery of funds for misclassified children - 121a.141
20. Control of funds and property. 121a.142
21. Records - 121a.143
22. Hearing on application - 121a.144
23. Prohibition of commingling - 121a.145
24. Annual evaluation - 121a.146
25. State advisory panel - 121a.147
26. Policies and procedures for use of Part B funds - 121a.148

27. Description of use of Part B funds. - 121a.149
28. Nondiscrimination of handicapped individuals; positive efforts must be made by the state to employ and advance in employment qualified handicapped individuals - 121a.150
29. Additional information if the state educational agency provides direct services. 121a.151

Section 104.5 of the Vocational Education Amendments requires the state education agency to insure that all educational programs for handicapped students within the state, including programs administered by any other state or local agency, are supervised by persons responsible for educational programs for handicapped students in the state educational agency.

IMPLICATIONS:

1. All education of handicapped students must be in keeping with the state standards for educating the handicapped. This must be considered in planning and implementing programs for the handicapped.

FUNDING--GENERAL

504	EHA	VEA
84.2	121a.110	104.32(b) & (c)
84.3(f), (g) & (h)	121a.141	104.93
84.5	121a.148-121a.149	104.141(f)
	121a.180-121a.194	104.171
	121a.229-121a.230	104.182
	121a.238	104.184-104.186
	121a.262	104.203-104.330
	121a.301-121a.302	104.501-104.502
	121a.304(b)	104.523(f)
	121a.320-121a.324	104.701
	121a.360-121a.372	104.802
	121a.450-121a.460	104.902
	121a.580-121a.593	
	121a.620-121a.621	
	121a.652(b)	
	121a.700-121a.754	

Section 121a.1 of the regulations implementing P.L. 94-142 clearly states that the act is to insure a free appropriate public education for all handicapped students. This includes special education and related services to meet their unique needs.

Sections 121a.180-121a.194 describe the procedures which each state must establish for the local education agencies to use in applying for Part B funds. These funds are to be used only for the excess costs of providing special education and related services to handicapped children.

Part B funds are subject to the priorities outlined in Section 121a.320 which states that funds must be used first for "first priority" students. These are handicapped students in an age group for which the state must make available free appropriate public education, but

who are not receiving any education. When all first priority students have been served, then funds may be used for "second priority" handicapped students who have the most severe handicaps and are receiving an inadequate education.

P.L. 94-482 regulations, sections 104.301-104.312 address federal expenditures involving the excess costs of educating the handicapped. The state is mandated in section 104.312 to spend at least 10 percent of the allotment under section 102(a) of the Act for vocational education for handicapped persons. This is to be done in regular vocational education programs as much as possible. The Commissioner can pay each state up to 50 percent of the excess cost for such programs and services with state and local funds matching the 50 percent. As in P.L. 94-142, P.L. 94-482 requires local educational agencies to spend at least the same amount on handicapped as on the nonhandicapped, prior to figuring the excess costs. In regulation 84.4(a), section 504 of the Rehabilitation Act of 1973 maintains that no qualified person shall be denied, on the basis of handicap, the benefits of any program or activity which receives benefits from federal financial assistance. Regular or special education, and related aids and services are to meet the needs of the handicapped as adequately as they meet the needs of the nonhandicapped persons.

IMPLICATIONS:

There are two major implications in P.L. 94-142, P.L. 94-482, and Section 504 of the Rehabilitation Act, regarding funding for vocational education for the handicapped:

1. Funding must be directed toward excess costs. This means that educational agencies should provide the same resources and benefits for handicapped students as they provide for nonhandicapped students. For example, regulations for P.L. 94-482 state that if the handicapped student is placed in a separate vocational program, federal funds and the 50 percent state and local matching funds may only pay those costs which exceed the average cost per pupil for vocational education for nonhandicapped students.
2. Funds should be used so handicapped persons can participate in regular vocational education programs with supplemental aids and services, which can be supported by both Part B funding and the 10 percent setaside vocational education funding. Both of these sources will be subject to specific requirements of their Acts and commingling prohibitions in the General Education Provisions.

When considering ways to utilize the above mentioned funding sources, the following should be reviewed:

1. Have state and local education agencies established procedures for finding and serving those students under 21 years of age, who have quit school, dropped out, or been forced out?
2. Does locating and serving the above mentioned students take "first priority" in the state and local education agencies?

3. Does the state use its 10 percent setaside funds for assisting handicapped persons to participate in regular vocational education programs?
4. When separate facilities and programs are necessary, has the state established procedures to assure that only excess costs are matched by the federal funds?
5. Has the state established procedures to assure that handicapped students are removed from regular programs ONLY when the nature or severity of their handicaps is such that they cannot be educated in regular classes even with supplementary aids and services?
6. When separation, mentioned above in the fifth implication, is deemed necessary, is the education handicapped students receive equal to that of the nonhandicapped?

EXEMPLARY AND INNOVATIVE PROGRAMS

504 EHA VEA

104.305
104.701-104.707

Regulation 104.706, implementing P.L. 94-482 indicates that the research coordinating unit may use funds available under section 130 of the Act for broadening students' occupational aspirations and opportunities, especially students who have academic, socioeconomic, or other handicaps. These programs include those which familiarize students with the broad range of occupations for which special skills are required and the requisites for careers in those occupations; and those which involve employers and labor organizations in postsecondary vocational education. Section 104.708 authorizes using funds for developing and distributing vocational education curriculum for handicapped persons.

Congress has appropriated $200,000,000.00 for fiscal year 1977 under the Education of Handicapped Children Act, Part B funds, for local and state education agencies to initiate, expand, and improve educational and related services to handicapped preschool, elementary and secondary children.

Section 504 of the Rehabilitation Act of 1973 points out in its analysis of the regulations of subpart D (42 FR p22690) that a recipient of federal funds operating in a public school system must either educate handicapped students in its regular program or provide

an appropriate alternative education at public expense.

IMPLICATIONS:

In order to meet the individual needs of handicapped students, the state may determine that it must develop new programs and curricula. Funds for such developments are available under both the amendments to the Vocational Education Act and the Education of All Handicapped Children Act.

1. Do state programs familiarize handicapped students with (1) a broad range of occupations for which special skills are required; and (2) the requisites for those occupations?
2. Do state programs involve employers and labor organizations in postsecondary vocational education of the handicapped?
3. Has the state local educational agency developed and distributed vocational education curriculum for handicapped persons?
4. If the state or local educational agency has taken steps to provide any of the above mentioned projects, is it applying for funds to develop such projects?

VOCATIONAL GUIDANCE AND COUNSELING

504	EHA	VEA
84.37(b)	121a.13	104.602
84.47(b)	121a.306	104.701(b)
	121a.553	104.761-104.764
		104.773

In section 121a.306 of the regulations implementing P.L. 94-142 vocational guidance and counseling falls under the heading of free appropriate public education which public agencies must provide for handicapped students. Under the vocational guidance and counseling program (section 134 of the Vocational Education Act, regulation 104.763) funds are available for establishing vocational resource centers to meet the special needs of various people, including handicapped persons.

Section 121a.553 of the regulations of the Education of All Handicapped Children Act requires that each public agency must insure that each handicapped student participates with nonhandicapped students in nonacademic and extracurricular services and activities to the maximum possible extent. This section reaffirms the new requirement of the final regulations for Section 504 of the Rehabilitation Act of 1973, which mandates that a handicapped student must also be provided nonacademic services in as integrated a setting as possible.

IMPLICATIONS:

Vocational guidance and counseling for handicapped students in as

integrated a setting as possible is now required by law through both the EHA and the VEA. Funds are available for establishing vocational resource centers which would serve the handicapped, among others. Caution must be exercised on the part of the state to insure that such a facility is used by both the nonhandicapped and the handicapped.

1. Has the state provided vocational guidance and counseling for all handicapped students?
2. Do state and local education agencies insure that vocational guidance and counseling occur in as integrated a setting as possible?
3. In a state or local education agency having vocational resource centers, are mechanisms required which assure its use by both handicapped and nonhandicapped students in as integrated a setting as possible?

APPENDICES

federal register

WEDNESDAY, MAY 4, 1977

PART IV

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Office of the Secretary

■

NONDISCRIMINATION ON BASIS OF HANDICAP

Programs and Activities Receiving or Benefiting from Federal Financial Assistance

Title 45—Public Welfare

SUBTITLE A—DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, GENERAL ADMINISTRATION

PART 84—NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS AND ACTIVITIES RECEIVING OR BENEFITING FROM FEDERAL FINANCIAL ASSISTANCE

AGENCY: Department of Health, Education, and Welfare.

ACTION: Final rule.

SUMMARY: This regulation implements section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 706, with regard to federal financial assistance administered by the Department of Health, Education, and Welfare. Section 504 provides that "no otherwise qualified handicapped individual * * * shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance." The regulation, which applies to all recipients of federal assistance from HEW, is intended to ensure that their federally assisted programs and activities are operated without discrimination on the basis of handicap. The regulation defines and forbids acts of discrimination against qualified handicapped persons in employment and in the operation of programs and activities receiving assistance from the Department. As employers, recipients must make reasonable accommodation to the handicaps of applicants and employees unless the accommodation would cause the employer undue hardship. As providers of services, recipients are required to make programs operated in existing facilities accessible to handicapped persons, to ensure that new facilities are constructed so as to be readily accessible to handicapped persons, and to operate their programs in a nondiscriminatory manner.

EFFECTIVE DATE: June 3, 1977.

FOR FURTHER INFORMATION, CONTACT:

John Wodatch, Director, Office of New Programs, Office for Civil Rights, Department of Health, Education, and Welfare, Washington, D.C. 20201, 202-245-1821.

SUPPLEMENTARY INFORMATION:

BACKGROUND

As part of the Rehabilitation Act of 1973 (Public Law 93-112) Congress enacted section 504, which provides that "no otherwise qualified handicapped individual in the United States, as defined in section 7(6), shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." In the same statute, Congress defined the term "handicapped individual" solely with relationship to employment; section 7(6) of the 1973 Act defined the term "handicapped individual" as "any individual who (a) has a physical or mental disability which for such individual constitutes or results in substantial handicap to employment and (b) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services * * *." However, the following year, in section 111(a) of the Rehabilitation Act Amendments of 1974 (Public Law 93-516), Congress amended the definition of "handicapped individual" for purposes of section 504 and the other provisions of titles IV and V of the Rehabilitation Act so that the definition is no longer limited to the dimension of employability. For purposes of section 504 of the Act, a "handicapped individual" is defined as "any person who (A) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (B) has a record of such an impairment, or (C) is regarded as having such an impairment." With this amended definition, it became clear that section 504 was intended to forbid discrimination against all handicapped individuals, regardless of their need for or ability to benefit from vocational rehabilitation services.

Section 504 thus represents the first Federal civil rights law protecting the rights of handicapped persons and reflects a national commitment to end discrimination on the basis of handicap. The language of section 504 is almost identical to the comparable nondiscrimination provisions of title VI of the Civil Rights Act of 1964 and title IX of the Education Amendments of 1972 (applying to racial discrimination and to discrimination in education on the basis of sex). It establishes a mandate to end discrimination and to bring handicapped persons into the mainstream of American life. The Secretary intends vigorously to implement and enforce that mandate.

THE PROBLEM OF DISCRIMINATION

From the outset, the Department has recognized that the problem of ending discrimination on the basis of handicap presents considerations that are extremely complex. The diversity of types of handicaps, as well as the wide variety of settings in which programs financed by the Department are offered, make the task of prescribing general rules of nondiscriminatory treatment a difficult one.

There is overwhelming evidence that in the past many handicapped persons have been excluded from programs entirely or denied equal treatment, simply because they are handicapped. But eliminating such gross exclusions and denials of equal treatment is not sufficient to assure genuine equal opportunity. In drafting a regulation to prohibit exclusion and discrimination, it became clear that different or special treatment of handicapped persons, because of their handicaps, may be necessary in a number of contexts in order to ensure equal opportunity. Thus, for example, it is meaningless to "admit" a handicapped person in a wheelchair to a program if the program is offered only on the third floor of a walk-up building. Nor is one providing equal educational opportunity to a deaf child by admitting him or her to a classroom but providing no means for the child to understand the teacher or receive instruction.

These problems have been compounded by the fact that ending discriminatory practices and providing equal access to programs may involve major burdens on some recipients. Those burdens and costs, to be sure, provide no basis for exemption from section 504 or this regulation: Congress' mandate to end discrimination is clear. But it is also clear that factors of burden and cost had to be taken into account in the regulation in prescribing the actions necessary to end discrimination and to bring handicapped persons into full participation in federally financed programs and activities.

The very general language of section 504 itself and the scant legislative history surrounding its enactment provide little guidance as to how these complex issues should be resolved. The rulemaking process in which the Department has engaged has, however, provided a basis for an initial resolution of those issues. The Secretary believes the resulting regulation offers genuine promise of providing an effective and workable program for ending discrimination against handicapped persons.

RULEMAKING HISTORY

On May 17, 1976, the Department published a Notice of Intent to Issue Proposed Rules, seeking public comment on fifteen identified critical issues. 41 FR 20296. A draft proposed rule was attached to the Notice of Intent, as was a statement of the estimated economic and inflationary impact of the draft proposal, prepared in accordance with the requirements of Executive Order 11821.

Over three hundred written comments were received in response to the Notice of Intent. The written comments were supplemented by a series of ten meetings conducted by the Office for Civil Rights at various locations across the country.

On July 16, 1976, the Department published a Notice of Proposed Rulemaking analyzing comments received on the critical issues identified in the Notice of Intent and setting forth a revised proposed regulation for public comment. 41 FR 29548. The initial 60-day comment period was extended in response to numerous requests until October 14, 1976. Additional comments received since that date have also been considered to the extent feasible. A total of more than 700 comments were received in response to the July 16 Notice of Proposed Rulemaking; they have been analyzed along with approximately 150 comments sent in response to May 17 Notice that were received too late to be analyzed during the first comment period. Finally, an additional twenty-two public meetings were held after publication of the July 16 Notice, again designed to inform interested persons and organizations of the proposed regulation and to solicit their comments and recommendations. Transcripts of all these meetings were made and analyzed along with the writ-

ten comments. Copies of these transcripts, as well as the written comments, are available for public inspection in Room 5400, 330 Independence Avenue, S.W., Washington, D.C. 20201.

The Secretary believes that both the written comments and the views expressed at the public meetings have illuminated the complex issues involved in implementing section 504 in an effective and workable fashion. The Secretary's response to the comments of interested parties, and the explanation for changes in the proposed regulation, are set forth in the section-by-section analysis of each subpart of the regulation, which appears as Appendix A to the regulation. As that analysis explains, a number of provisions in the proposed regulation have been eliminated as duplicative or unnecessary; others have been shortened or clarified. The goal throughout has been to design a regulation that preserves the essential elements of a strong and effective program for ending discrimination, while avoiding the imposition of unnecessary or counterproductive administrative obligations on recipients.

Overview of Regulation

The regulation is divided into seven subparts. Subpart A (General Provisions) defines the important terms that are used throughout the regulation and states in general terms the discriminatory acts that are prohibited. It also sets forth what the Secretary believes is a simple, workable system of administration: assurances of compliance, self-evaluation by recipients, establishment of grievance procedures, and notification of employes and beneficiaries of the recipient's policy of nondiscrimination on the basis of handicap. The regulation covers all types of physical and mental impairments, including drug addition and alcoholism.

Subpart B, dealing with employment practices, bars discrimination by recipients of HEW assistance in recruitment, hiring, compensation, job assignment and classification, and fringe benefits. It also requires employers to make reasonable accommodation to qualified handicapped applicants or employees unless it can be demonstrated that the accommodation would impose an undue hardship on the employer.

Subpart C sets forth the central requirement of the regulation—program accessibility. All new facilities are required to be constructed so as to be readily accessible to and usable by handicapped persons. Every existing facility need not be made physically accessible, but all recipients must ensure that programs conducted in those facilities are made accessible. While flexibility is allowed in choosing methods that in fact make programs in existing facilities accessible, structural changes in such facilities must be undertaken if no other means of assuring program accessibility is available.

Subparts A, B, and C of the regulation, as well as subpart G—which incorporates by reference the Department's procedures under title VI of the Civil Rights Act of 1964—apply to all recipients of financial assistance from the Department. The remaining subparts of the regulation contain more specific requirements applicable to three major classes of recipients.

Subpart D is concerned with preschool, elementary, and secondary education. Its provisions have been closely coordinated with those of the Education for All Handicapped Children Act of 1975 (Pub. L. 94-142). They require, basically, that recipients operating public education programs provide a free appropriate education to each qualified handicapped child in the most normal setting appropriate. The regulation also sets forth evaluation requirements designed to ensure the proper classification and placement of handicapped children, and due process procedures for resolving disputes over placement of students. While the Department does not intend to review individual placement decisions, it does intend to ensure that testing and evaluation procedures required by the regulation are carried out, and that school systems provide an adequate opportunity for parents to challenge and seek review of these critical decisions. And the Department will place a high priority on pursuing cases in which a pattern or practice of discriminatory placements may be involved.

Subpart E deals with postsecondary education. It proscribes discrimination against handicapped persons in recruitment, admission and treatment after admission. Colleges and universities are required to make reasonable adjustments to permit handicapped persons to fulfill academic requirements, and to ensure that they are not effectively excluded from programs because of the absence of auxiliary aids. Groups of colleges may not establish consortia exclusively for handicapped students.

Finally, Subpart F deals with health, welfare and other social service programs. It forbids discrimination in providing such services and requires larger recipients to provide auxiliary aids to handicapped individuals where necessary. Specific provisions require hospitals not to discriminate against addicts or alcoholics who need medical services and to establish emergency room procedures for communication with persons with impaired hearing. Under Subpart C, health and social service providers may satisfy their program accessibility obligations with respect to existing facilities by arranging to meet beneficiaries in accessible locations. In addition, small providers may refer patients or other beneficiaries to accessible providers as a "last resort" alternative to making significant structural changes.

Executive Order 11914

Under Executive Order 11914 (41 FR 17871, April 28, 1976), the Department is required to issue general standards for other departments and agencies of the Federal government to follow in promulgating regulations implementing Section 504. This responsibility will be fulfilled promptly and independently from this regulation. The Department does, however, expect to incorporate the definition of handicapped person adopted in § 84.3 (j) of this regulation in the standards for determining what persons are covered by the Act. The Secretary also anticipates that the relevant provisions of Subparts A, B and C of the regulation will be the basis for guidelines, pursuant to the Executive Order, as to what are discriminatory practices.

Economic Impact

The Department has previously certified, in issuing the Notice of Intent and the Notice of Proposed Rulemaking, that the economic and inflationary impact of the proposed regulation had been carefully evaluated in accordance with OMB Circular A-107. That analysis, which was printed at 41 FR 20312 (May 17, 1976), has been revised and updated, and is available on request.

Section-by-Section Analysis of Regulation

Appended to the final regulation is a section-by-section analysis of the regulation, which describes the basis and purpose of each section, discusses significant comments, and explains the basis for any changes made from the proposed regulation published in July 1976.

In consideration of the foregoing, Part 84, to read as set forth below, is hereby ordered to be added to Title 45 of the Code of Federal Regulations.

Dated: April 28, 1977.

JOSEPH A. CALIFANO, JR.,
Secretary, Department of Health, Education, and Welfare.

Subpart A—General Provisions

Sec.
84.1 Purpose.
84.2 Application.
84.3 Definitions.
84.4 Discrimination prohibited.
84.5 Assurances required.
84.6 Remedial action, voluntary action, and self-evaluation.
84.7 Designation of responsible employee and adoption of grievance procedures.
84.8 Notice.
84.9 Administrative requirements for small recipients.
84.10 Effect of state or local law or other requirements and effect of employment opportunities.

Subpart B—Employment Practices

84.11 Discrimination prohibited.
84.12 Reasonable accommodation.
84.13 Employment criteria.
84.14 Preemployment inquiries.
84.15-84.20 [Reserved]

Subpart C—Program Accessibility

84.21 Discrimination prohibited.
84.22 Existing facilities.
84.23 New construction.
84.24-84.30 [Reserved]

Subpart D—Preschool, Elementary, and Secondary Education

84.31 Application of this subpart.
84.32 Location and notification.
84.33 Free appropriate public education.
84.34 Educational setting.
84.35 Evaluation and placement.

Sec.
84.36 Procedural safeguards.
84.37 Nonacademic services.
84.38 Preschool and adult education programs.
84.39 Private education programs.
84.40 [Reserved]

Subpart E—Postsecondary Education

84.41 Application of this subpart.
84.42 Admissions and recruitment.
84.43 Treatment of students; general.
84.44 Academic adjustments.
84.45 Housing.
84.46 Financial and employment assistance to students.
84.47 Nonacademic services.
84.48–84.50 [Reserved]

Subpart F—Health, Welfare, and Social Services

84.51 Application of this subpart.
84.52 Health, welfare, and other social services.
84.53 Drug and alcohol addicts.
84.54 Education of institutionalized persons.
84.55–84.60 [Reserved]

Subpart G—Procedures

84.61 Procedures.
84.62–99 [Reserved]

Appendix A—Analysis of Final Regulation

Authority: Sec. 504, Rehabilitation Act of 1973, Pub. L. 93–112, 87 Stat. 394 (29 U.S.C. 794); sec. 111(a), Rehabilitation Act Amendments of 1974, Pub. L. 93–516, 88 Stat. 1619 (29 U.S.C. 706); sec. 606, Education of the Handicapped Act (20 U.S.C. 1405), as amended by Pub. L. 94–142, 89 Stat 795; sec. 321, Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act of 1970, 84 Stat. 182 (42 U.S.C. 4581), as amended; sec. 407, Drug Abuse Office and Treatment Act of 1972, 86 Stat. 78 (21 U.S.C. 1174), as amended.

Subpart A—General Provisions

§ 84.1 Purpose.

The purpose of this part is to effectuate section 504 of the Rehabilitation Act of 1973, which is designed to eliminate discrimination on the basis of handicap in any program or activity receiving Federal financial assistance.

§ 84.2 Application.

This part applies to each recipient of Federal financial assistance from the Department of Health, Education, and Welfare and to each program or activity that receives or benefits from such assistance.

§ 84.3 Definitions.

As used in this part, the term:

(a) "The Act" means the Rehabilitation Act of 1973, Pub. L. 93–112, as amended by the Rehabilitation Act Amendments of 1974, Public Law 93–516, 29 U.S.C. 794.

(b) "Section 504" means section 504 of the Act.

(c) "Education of the Handicapped Act" means that statute as amended by the Education for all Handicapped Children Act of 1975, Pub. L. 94–142, 20 U.S.C. 1401 et seq.

(d) "Department" means the Department of Health, Education, and Welfare.

(e) "Director" means the Director of the Office for Civil Rights of the Department.

(f) "Recipient" means any state or its political subdivision, any instrumentality of a state or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient, including any successor, assignee, or transferee of a recipient, but excluding the ultimate beneficiary of the assistance.

(g) "Applicant for assistance" means one who submits an application, request, or plan required to be approved by a Department official or by a recipient as a condition to becoming a recipient.

(h) "Federal financial assistance" means any grant, loan, contract (other than a procurement contract or a contract of insurance or guaranty), or any other arrangement by which the Department provides or otherwise makes available assistance in the form of:

(1) Funds;

(2) Services of Federal personnel; or

(3) Real and personal property or any interest in or use of such property, including:

(i) Transfers or leases of such property for less than fair market value or for reduced consideration; and

(ii) Proceeds from a subsequent transfer or lease of such property if the Federal share of its fair market value is not returned to the Federal Government.

(i) "Facility" means all or any portion of buildings, structures, equipment, roads, walks, parking lots, or other real or personal property or interest in such property.

(j) "Handicapped person." (1) "Handicapped persons" means any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.

(2) As used in paragraph (j)(1) of this section, the phrase:

(i) "Physical or mental impairment" means (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(ii) "Major life activities" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(iii) "Has a record of such an impairment" means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(iv) "Is regarded as having an impairment" means (A) has a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such a limitation; (B) has a physical or mental impairment that substantially limits major life acitivities only as a result of the attitudes of others toward such impairment; or (C) has none of the impairments defined in paragraph (j)(2)(i) of this section but is treated by a recipient as having such an impairment.

(k) "Qualified handicapped person" means:

(1) With respect to employment, a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question;

(2) With respect to public preschool, elementary, secondary, or adult educational services, a handicapped person (i) of an age during which nonhandicapped persons are provided such services, (ii) of any age during which it is mandatory under state law to provide such services to handicapped persons, or (iii) to whom a state is required to provide a free appropriate public education under § 612 of the Education of the Handicapped Act; and

(3) With respect to postsecondary and vocational education services, a handicapped person who meets the academic and technical standards requisite to admission or participation in the recipient's education program or activity;

(4) With respect to other services, a handicapped person who meets the essential eligibility requirements for the receipt of such services.

(l) "Handicap" means any condition or characteristic that renders a person a handicapped person as defined in paragraph (j) of this section.

§ 84.4 Discrimination prohibited.

(a) *General.* No qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives or benefits from Federal financial assistance.

(b) *Discriminatory actions prohibited.* (1) A recipient, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap:

(i) Deny a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified handicapped person an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified handicapped person with an aid, benefit, or service that is not as effective as that provided to others;

(iv) Provide different or separate aid, benefits, or services to handicapped persons or to any class of handicapped persons unless such action is necessary to provide qualified handicapped persons with aid, benefits, or services that are as effective as those provided to others;

(v) Aid or perpetuate discrimination against a qualified handicapped person

by providing significant assistance to an agency, organization, or person that discriminates on the basis of handicap in providing any aid, benefit, or service to beneficiaries of the recipients program;

(vi) Deny a qualified handicapped person the opportunity to participate as a member of planning or advisory boards; or

(vii) Otherwise limit a qualified handicapped person in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit, or service.

(2) For purposes of this part, aids, benefits, and services, to be equally effective, are not required to produce the identical result or level of achievement for handicapped and nonhandicapped persons, but must afford handicapped persons equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement, in the most integrated setting appropriate to the person's needs.

(3) Despite the existence of separate or different programs or activities provided in accordance with this part, a recipient may not deny a qualified handicapped person the opportunity to participate in such programs or activities that are not separate or different.

(4) A recipient may not, directly or through contractual or other arrangements, utilize criteria or methods of administration (i) that have the effect of subjecting qualified handicapped persons to discrimination on the basis of handicap, (ii) that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient's program with respect to handicapped persons, or (iii) that perpetuate the discrimination of another recipient if both recipients are subject to common administrative control or are agencies of the same State.

(5) In determining the site or location of a facility, an applicant for assistance or a recipient may not make selections (i) that have the effect of excluding handicapped persons from, denying them the benefits of, or otherwise subjecting them to discrimination under any program or activity that receives or benefits from Federal financial assistance or (ii) that have the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the program or activity with respect to handicapped persons.

(6) As used in this section, the aid, benefit, or service provided under a program or activity receiving or benefiting from Federal financial assistance includes any aid, benefit, or service provided in or through a facility that has been constructed, expanded, altered, leased or rented, or otherwise acquired, in whole or in part, with Federal financial assistance.

(c) *Programs limited by Federal law.* The exclusion of nonhandicapped persons from the benefits of a program limited by Federal statute or executive order to handicapped persons or the exclusion of a specific class of handicapped persons from a program limited by Federal statute or executive order to a different class of handicapped persons is not prohibited by this part.

§ 84.5 Assurances required.

(a) *Assurances.* An applicant for Federal financial assistance for a program or activity to which this part applies shall submit an assurance, on a form specified by the Director, that the program will be operated in compliance with this part. An applicant may incorporate these assurances by reference in subsequent applications to the Department.

(b) *Duration of obligation.* (1) In the case of Federal financial assistance extended in the form of real property or to provide real property or structures on the property, the assurance will obligate the recipient or, in the case of a subsequent transfer, the transferee, for the period during which the real property or structures are used for the purpose for which Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits.

(2) In the case of Federal financial assistance extended to provide personal property, the assurance will obligate the recipient for the period during which it retains ownership or possession of the property.

(3) In all other cases the assurance will obligate the recipient for the period during which Federal financial assistance is extended.

(c) *Covenants.* (1) Where Federal financial assistance is provided in the form of real property or interest in the property from the Department, the instrument effecting or recording this transfer shall contain a covenant running with the land to assure nondiscrimination for the period during which the real property is used for a purpose for which the Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits.

(2) Where no transfer of property is involved but property is purchased or improved with Federal financial assistance, the recipient shall agree to include the covenant described in paragraph (b)(2) of this section in the instrument effecting or recording any subsequent transfer of the property.

(3) Where Federal financial assistance is provided in the form of real property or interest in the property from the Department, the covenant shall also include a condition coupled with a right to be reserved by the Department to revert title to the property in the event of a breach of the covenant. If a transferee of real property proposes to mortgage or otherwise encumber the real property as security for financing construction of new, or improvement of existing, facilities on the property for the purposes for which the property was transferred, the Director may, upon request of the transferee and if necessary to accomplish such financing and upon such conditions as he or she deems appropriate, agree to forbear the exercise of such right to revert title for so long as the lien of such mortgage or other encumbrance remains effective.

§ 84.6 Remedial action, voluntary action, and self-evaluation.

(a) *Remedial action.* (1) If the Director finds that a recipient has discriminated against persons on the basis of handicap in violation of section 504 or this part, the recipient shall take such remedial action as the Director deems necessary to overcome the effects of the discrimination.

(2) Where a recipient is found to have discriminated against persons on the basis of handicap in violation of section 504 or this part and where another recipient exercises control over the recipient that has discriminated, the Director, where appropriate, may require either or both recipients to take remedial action.

(3) The Director may, where necessary to overcome the effects of discrimination in violation of section 504 or this part, require a recipient to take remedial action (i) with respect to handicapped persons who are no longer participants in the recipient's program but who were participants in the program when such discrimination occurred or (ii) with respect to handicapped persons who would have been participants in the program had the discrimination not occurred.

(b) *Voluntary action.* A recipient may take steps, in addition to any action that is required by this part, to overcome the effects of conditions that resulted in limited participation in the recipient's program or activity by qualified handicapped persons.

(c) *Self-evalution.* (1) A recipient shall, within one year of the effective date of this part:

(i) Evaluate, with the assistance of interested persons, including handicapped persons or organizations representing handicapped persons, its current policies and practices and the effects thereof that do not or may not meet the requirements of this part;

(ii) Modify, after consultation with interested persons, including handicapped persons or organizations representing handicapped persons, any policies and practices that do not meet the requirements of this part; and

(iii) Take, after consultation with interested persons, including handicapped persons or organizations representing handicapped persons, appropriate remedial steps to eliminate the effects of any discrimination that resulted from adherence to these policies and practices.

(2) A recipient that employs fifteen or more persons shall, for at least three years followed completion of the evaluation required under paragraph (c)(1) of this section, maintain on file, make available for public inspection, and provide to the Director upon request: (i) a list of the interested persons consulted, (ii) a description of areas examined and any problems identified, and (iii) a description of any modifications made and of any remedial steps taken.

§ 84.7 Designation of responsible employee and adoption of grievance procedures.

(a) *Designation of responsible employee.* A recipient that employs fifteen or more persons shall designate at least one person to coordinate its efforts to comply with this part.

(b) *Adoption of grievance procedures.* A recipient that employs fifteen or more persons shall adopt grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints alleging any action prohibited by this part. Such procedures need not be established with respect to complaints from applicants for employment or from applicants for admission to postsecondary educational institutions.

§ 84.8 Notice.

(a) A recipient that employs fifteen or more persons shall take appropriate initial and continuing steps to notify participants, beneficiaries, applicants, and employees, including those with impaired vision or hearing, and unions or professional organizations holding collective bargaining or professional agreements with the recipient that it does not discriminate on the basis of handicap in violation of section 504 and this part. The notification shall state, where appropriate, that the recipient does not discriminate in admission or access to, or treatment or employment in, its programs and activities. The notification shall also include an identification of the responsible employee designated pursuant to § 84.7(a). A recipient shall make the initial notification required by this paragraph within 90 days of the effective date of this part. Methods of initial and continuing notification may include the posting of notices, publication in newspapers and magazines, placement of notices in recipients' publication, and distribution of memoranda or other written communications.

(b) If a recipient publishes or uses recruitment materials or publications containing general information that it makes available to participants, beneficiaries, applicants, or employees, it shall include in those materials or publications a statement of the policy described in paragraph (a) of this section. A recipient may meet the requirement of this paragraph either by including appropriate inserts in existing materials and publications or by revising and reprinting the materials and publications.

§ 84.9 Administrative requirements for small recipients.

The Director may require any recipient with fewer than fifteen employees, or any class of such recipients, to comply with §§ 84.7 and 84.8, in whole or in part, when the Director finds a violation of this part or finds that such compliance will not significantly impair the ability of the recipient or class of recipients to provide benefits or services.

§ 84.10 Effect of state or local law or other requirements and effect of employment opportunities.

(a) The obligation to comply with this part is not obviated or alleviated by the existence of any state or local law or other requirement that, on the basis of handicap, imposes prohibitions or limits upon the eligibility of qualified handicapped persons to receive services or to practice any occupation or profession.

(b) The obligation to comply with this part is not obviated or alleviated because employment opportunities in any occupation or profession are or may be more limited for handicapped persons than for nonhandicapped persons.

Subpart B—Employment Practices

§ 84.11 Discrimination prohibited.

(a) *General.* (1) No qualified handicapped person shall, on the basis of handicap, be subjected to discrimination in employment under any program or activity to which this part applies.

(2) A recipient that receives assistance under the Education of the Handicapped Act shall take positive steps to employ and advance in employment qualified handicapped persons in programs assisted under that Act.

(3) A recipient shall make all decisions concerning employment under any program or activity to which this part applies in a manner which ensures that discrimination on the basis of handicap does not occur and may not limit, segregate, or classify applicants or employees in any way that adversely affects their opportunities or status because of handicap.

(4) A recipient may not participate in a contractual or other relationship that has the effect of subjecting qualified handicapped applicants or employees to discrimination prohibited by this subpart. The relationships referred to in this subparagraph include relationships with employment and referral agencies, with labor unions, with organizations providing or administering fringe benefits to employees of the recipient, and with organizations providing training and apprenticeship programs.

(b) *Specific activities.* The provisions of this subpart apply to:

(1) Recruitment, advertising, and the processing of applications for employment;

(2) Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff, and rehiring;

(3) Rates of pay or any other form of compensation and changes in compensation;

(4) Job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists;

(5) Leaves of absense, sick leave, or any other leave;

(6) Fringe benefits available by virtue of employment, whether or not administered by the recipient;

(7) Selection and financial support for training, including apprenticeship, professional meetings, conferences, and other related activities, and selection for leaves of absence to pursue training;

(8) Employer sponsored activities, including social or recreational programs; and

(9) Any other term, condition, or privilege of employment.

(c) A recipient's obligation to comply with this subpart is not affected by any inconsistent term of any collective bargaining agreement to which it is a party.

§ 84.12 Reasonable accommodation.

(a) A recipient shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program.

(b) Reasonable accommodation may include: (1) making facilities used by employees readily accessible to and usable by handicapped persons, and (2) job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, the provision of readers or interpreters, and other similar actions.

(c) In determining pursuant to paragraph (a) of this section whether an accommodation would impose an undue hardship on the operation of a recipient's program, factors to be considered include:

(1) The overall size of the recipient's program with respect to number of employees, number and type of facilities, and size of budget;

(2) The type of the recipient's operation, including the composition and structure of the recipient's workforce; and

(3) The nature and cost of the accommodation needed.

(d) A recipient may not deny any employment opportunity to a qualified handicapped employee or applicant if the basis for the denial is the need to make reasonable accommodation to the physical or mental limitations of the employee or applicant.

§ 84.13 Employment criteria.

(a) A recipient may not make use of any employment test or other selection criterion that screens out or tends to screen out handicapped persons or any class of handicapped persons unless: (1) the test score or other selection criterion, as used by the recipient, is shown to be job-related for the position in question, and (2) alternative job-related tests or criteria that do not screen out or tend to screen out as many handicapped persons are not shown by the Director to be available.

(b) A recipient shall select and administer tests concerning employment so as best to ensure that, when administered to an applicant or employee who has a handicap that impairs sensory, manual, or speaking skills, the test results accu-

rately reflect the applicant's or employee's job skills, aptitude, or whatever other factor the test purports to measure, rather than reflecting the applicant's or employee's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure).

§ 84.14 Preemployment inquiries.

(a) Except as provided in paragraphs (b) and (c) of this section, a recipient may not conduct a preemployment medical examination or may not make preemployment inquiry of an applicant as to whether the applicant is a handicapped person or as to the nature or severity of a handicap. A recipient may, however, make preemployment inquiry into an applicant's ability to perform job-related functions.

(b) When a recipient is taking remedial action to correct the effects of past discrimination pursuant to § 84.6 (a), when a recipient is taking voluntary action to overcome the effects of conditions that resulted in limited participation in its federally assisted program or activity pursuant to § 84.6(b), or when a recipient is taking affirmative action pursuant to section 503 of the Act, the recipient may invite applicants for employment to indicate whether and to what extent they are handicapped, *Provided*, That:

(1) The recipient states clearly on any written questionnaire used for this purpose or makes clear orally if no written questionnaire is used that the information requested is intended for use solely in connection with its remedial action obligations or its voluntary or affirmative action efforts; and

(2) The recipient states clearly that the information is being requested on a voluntary basis, that it will be kept confidential as provided in paragraph (d) of this section, that refusal to provide it will not subject the applicant or employee to any adverse treatment, and that it will be used only in accordance with this part.

(c) Nothing in this section shall prohibit a recipient from conditioning an offer of employment on the results of a medical examination conducted prior to the employee's entrance on duty, *Provided*, That: (1) All entering employees are subjected to such an examination regardless of handicap, and (2) the results of such an examination are used only in accordance with the requirements of this part.

(d) Information obtained in accordance with this section as to the medical condition or history of the applicant shall be collected and maintained on separate forms that shall be accorded confidentiality as medical records, except that:

(1) Supervisors and managers may be informed regarding restrictions on the work or duties of handicapped persons and regarding necessary accommodations;

(2) First aid and safety personnel may be informed, where appropriate, if the condition might require emergency treatment; and

(3) Government officials investigating compliance with the Act shall be provided relevant information upon request.

§§ 84.15—84.20 [Reserved]

Subpart C—Program Accessibility

§ 84.21 Discrimination prohibited.

No qualified handicapped person shall, because a recipient's facilities are inaccessible to or unusable by handicapped persons, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity to which this part applies.

§ 84.22 Existing facilities.

(a) *Program accessibility.* A recipient shall operate each program or activity to which this part applies so that the program or activity, when viewed in its entirety, is readily accessible to handicapped persons. This paragraph does not require a recipient to make each of its existing facilities or every part of a facility accessible to and usable by handicapped persons.

(b) *Methods.* A recipient may comply with the requirement of paragraph (a) of this section through such means as redesign of equipment, reassignment of classes or other services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of health, welfare, or other social services at alternate accessible sites, alteration of existing facilities and construction of new facilities in conformance with the requirements of § 84.23, or any other methods that result in making its program or activity accessible to handicapped persons. A recipient is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with paragraph (a) of this section. In choosing among available methods for meeting the requirement of paragraph (a) of this section, a recipient shall give priority to those methods that offer programs and activities to handicapped persons in the most integrated setting appropriate.

(c) *Small health, welfare, or other social service providers.* If a recipient with fewer than fifteen employees that provides health, welfare, or other social services finds, after consultation with a handicapped person seeking its services, that there is no method of complying with paragraph (a) of this section other than making a significant alteration in its existing facilities, the recipient may, as an alternative, refer the handicapped person to other providers of those services that are accessible.

(d) *Time period.* A recipient shall comply with the requirement of paragraph (a) of this section within sixty days of the effective date of this part except that where structural changes in facilities are necessary, such changes shall be made within three years of the effective date of this part, but in any event as expeditiously as possible.

(e) *Transition plan.* In the event that structural changes to facilities are necessary to meet the requirement of paragraph (a) of this section, a recipient shall develop, within six months of the effective date of this part, a transition plan setting forth the steps necessary to complete such changes. The plan shall be developed with the assistance of interested persons, including handicapped persons or organizations representing handicapped persons. A copy of the transition plan shall be made available for public inspection. The plan shall, at a minimum:

(1) Identify physical obstacles in the recipient's facilities that limit the accessibility of its program or activity to handicapped persons;

(2) Describe in detail the methods that will be used to make the facilities accessible;

(3) Specify the schedule for taking the steps necessary to achieve full program accessibility and, if the time period of the transition plan is longer than one year, identify steps that will be taken during each year of the transition period; and

(4) Indicate the person responsible for implementation of the plan.

(f) *Notice.* The recipient shall adopt and implement procedures to ensure that interested persons, including persons with impaired vision or hearing, can obtain information as to the existence and location of services, activities, and facilities that are accessible to and usable by handicapped persons.

§ 84.23 New construction.

(a) *Design and construction.* Each facility or part of a facility constructed by, on behalf of, or for the use of a recipient shall be designed and constructed in such manner that the facility or part of the facility is readily accessible to and usable by handicapped persons, if the construction was commenced after the effective date of this part.

(b) *Alteration.* Each facility or part of a facility which is altered by, on behalf of, or for the use of a recipient after the effective date of this part in a manner that affects or could affect the usability of the facility or part of the facility shall, to the maximum extent feasible, be altered in such manner that the altered portion of the facility is readily accessible to and usable by handicapped persons.

(c) *American National Standards Institute accessibility standards.* Design, construction, or alteration of facilities in conformance with the "American National Standard Specifications for Making Buildings and Facilities Accessible to, and Usable by, the Physically Handicapped," published by the American National Standards Institute, Inc. (ANSI A117.1–1961 (R1971)),[1] which is incorporated by reference in this part, shall constitute compliance with paragraphs (a) and (b) of this section. Departures from particular requirements of those standards by the use of other methods shall be permitted when it is clearly evident that equivalent access to the facility or part of the facility is thereby provided.

[1] Copies obtainable from American National Standards Institute, Inc., 1430 Broadway, New York, N.Y. 10018.

§§ 84.24–84.30. [Reserved]

Subpart D—Preschool, Elementary, and Secondary Education

§ 84.31 Application of this subpart.

Subpart D applies to preschool, elementary, secondary, and adult education programs and activities that receive or benefit from federal financial assistance and to recipients that operate, or that receive or benefit from federal financial assistance for the operation of, such programs or activities.

§ 84.32 Location and notification.

A recipient that operates a public elementary or secondary education program shall annually:

(a) Undertake to identify and locate every qualified handicapped person residing in the recipient's jurisdiction who is not receiving a public education; and

(b) Take appropriate steps to notify handicapped persons and their parents or guardians of the recipient's duty under this subpart.

§ 84.33 Free appropriate public education.

(a) *General.* A recipient that operates a public elementary or secondary education program shall provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap.

(b) *Appropriate education.* (1) For the purpose of this subpart, the provision of an appropriate education is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of §§ 84.34, 84.35, and 84.36.

(2) Implementation of an individualized education program developed in accordance with the Education of the the Handicapped Act is one means of meeting the standard established in paragraph (b)(1)(i) of this section.

(3) A recipient may place a handicapped person in or refer such person to a program other than the one that it operates as its means of carrying out the requirements of this subpart. If so, the recipient remains responsible for ensuring that the requirements of this subpart are met with respect to any handicapped person so placed or referred.

(c) *Free education*—(1) *General.* For the purpose of this section, the provision of a free education is the provision of educational and related services without cost to the handicapped person or to his or her parents or guardian, except for those fees that are imposed on nonhandicapped persons or their parents or guardian. It may consist either of the provision of free services or, if a recipient places a handicapped person in or refers such person to a program not operated by the recipient as its means of carrying out the requirements of this subpart, of payment for the costs of the program. Funds available from any public or private agency may be used to meet the requirements of this subpart. Nothing in this section shall be construed to relieve an insurer or similar third party from an otherwise valid obligation to provide or pay for services provided to a handicapped person.

(2) *Transportation.* If a recipient places a handicapped person in or refers such person to a program not operated by the recipient as its means of carrying out the requirements of this subpart, the recipient shall ensure that adequate transportation to and from the program is provided at no greater cost than would be incurred by the person or his or her parents or guardian if the person were placed in the program operated by the recipient.

(3) *Residential placement.* If placement in a public or private residential program is necessary to provide a free appropriate public education to a handicapped person because of his or her handicap, the program, including nonmedical care and room and board, shall be provided at no cost to the person or his or her parents or guardian.

(4) *Placement of handicapped persons by parents.* If a recipient has made available, in conformance with the requirements of this section and § 84.34, a free appropriate public education to a handicapped person and the person's parents or guardian choose to place the person in a private school, the recipient is not required to pay for the person's education in the private school. Disagreements between a parent or guardian and a recipient regarding whether the recipient has made such a program available or otherwise regarding the question of financial responsibility are subject to the due process procedures of § 84.36.

(d) *Compliance.* A recipient may not exclude any qualified handicapped person from a public elementary or secondary education after the effective date of this part. A recipient that is not, on the effective date of this regulation, in full compliance with the other requirements of the preceding paragraphs of this section shall meet such requirements at the earliest practicable time and in no event later than September 1, 1978.

§ 84.34 Educational setting.

(a) *Academic setting.* A recipient to which this subpart applies shall educate, or shall provide for the education of, each qualified handicapped person in its jurisdiction with persons who are not handicapped to the maximum extent appropriate to the needs of the handicapped person. A recipient shall place a handicapped person in the regular educational environment operated by the recipient unless it is demonstrated by the recipient that the education of the person in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily. Whenever a recipient places a person in a setting other than the regular educational environment pursuant to this paragraph, it shall take into account the proximity of the alternate setting to the person's home.

(b) *Nonacademic settings.* In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, and the services and activities set forth in § 84.37(a)(2), a recipient shall ensure that handicapped persons participate with nonhandicapped persons in such activities and services to the maximum extent appropriate to the needs of the handicapped person in question.

(c) *Comparable facilities.* If a recipient, in compliance with paragraph (a) of this section, operates a facility that is identifiable as being for handicapped persons, the recipient shall ensure that the facility and the services and activities provided therein are comparable to the other facilities, services, and activities of the recipient.

§ 84.35 Evaluation and placement.

(a) *Preplacement evaluation.* A recipient that operates a public elementary or secondary education program shall conduct an evaluation in accordance with the requirements of paragraph (b) of this section of any person who, because of handicap, needs or is believed to need special education or related services before taking any action with respect to the initial placement of the person in a regular or special education program and any subsequent significant change in placement.

(b) *Evaluation procedures.* A recipient to which this subpart applies shall establish standards and procedures for the evaluation and placement of persons who, because of handicap, need or are believed to need special education or related services which ensure that:

(1) Tests and other evaluation materials have been validated for the specific purpose for which they are used and are administered by trained personnel in conformance with the instructions provided by their producer;

(2) Tests and other evaluation materials include those tailored to assess specific areas of educational need and not merely those which are designed to provide a single general intelligence quotient; and

(3) Tests are selected and administered so as best to ensure that, when a test is administered to a student with impaired sensory, manual, or speaking skills, the test results accurately reflect the student's aptitude or achievement level or whatever other factor the test purports to measure, rather than reflecting the student's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure).

(c) *Placement procedures.* In interpreting evaluation data and in making placement decisions, a recipient shall (1) draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior, (2) establish procedures to ensure that information obtained from all such

sources is documented and carefully considered, (3) ensure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options, and (4) ensure that the placement decision is made in conformity with § 84.34.

(d) *Reevaluation.* A recipient to which this section applies shall establish procedures, in accordance with paragraph (b) of this section, for periodic reevaluation of students who have been provided special education and related services. A reevaluation procedure consistent with the Education for the Handicapped Act is one means of meeting this requirement.

§ 84.36 Procedural safeguards.

A recipient that operates a public elementary or secondary education program shall establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of persons who, because of handicap, need or are believed to need special instruction or related services, a system of procedural safeguards that includes notice, an opportunity for the parents or guaradian of the person to examine relevant records, an impartial hearing with opportunity for participation by the person's parents or guardian and representation by counsel, and a review procedure. Compliance with the procedural safeguards of section 615 of the Education of the Handicapped Act is one means of meeting this requirement.

§ 84.37 Nonacademic services.

(a) *General.* (1) A recipient to which this subpart applies shall provide nonacademic and extracurricular services and activities in such manner as is necessary to afford handicapped students an equal opportunity for participation in such services and activities.

(2) Nonacademic and extracurricular services and activities may include counseling services, physical recreational athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the recipient, referrals to agencies which provide assistance to handicapped persons, and employment of students, including both employment by the recipient and assistance in making available outside employment.

(b) *Counseling services.* A recipient to which this subpart applies that provides personal, academic, or vocational counseling, guidance, or placement services to its students shall provide these services without discrimination on the basis of handicap. The recipient shall ensure that qualified handicapped students are not counseled toward more restrictive career objectives than are nonhandicapped students with similar interests and abilities.

(c) *Physical education and athletics.* (1) In providing physical education courses and athletics and similar programs and activities to any of its students, a recipient to which this subpart applies may not discriminate on the basis of handicap. A recipient that offers physical education courses or that operates or sponsors interscholastic, club, or intramural athletics shall provide to qualified handicapped students an equal opportunity for participation in these activities.

(2) A recipient may offer to handicapped students physical education and athletic activities that are separate or different from those offered to nonhandicapped students only if separation or differentiation is consistent with the requirements of § 84.34 and only if no qualified handicapped student is denied the opportunity to compete for teams or to participate in courses that are not separate or different.

§ 84.38 Preschool and adult education programs.

A recipient to which this subpart applies that operates a preschool education or day care program or activity or an adult education program or activity may not, on the basis of handicap, exclude qualified handicapped persons from the program or activity and shall take into account the needs of such persons in determining the aid, benefits, or services to be provided under the program or activity.

§ 84.39 Private education programs.

(a) A recipient that operates a private elementary or secondary education program may not, on the basis of handicap, exclude a qualified handicapped person from such program if the person can, with minor adjustments, be provided an appropriate education, as defined in § 84.33(b)(1), within the recipient's program.

(b) A recipient to which this section applies may not charge more for the provision of an appropriate education to handicapped persons than to nonhandicapped persons except to the extent that any additional charge is justified by a substantial increase in cost to the recipient.

(c) A recipient to which this section applies that operates special education programs shall operate such programs in accordance with the provisions of §§ 84.35 and 84.36. Each recipient to which this section applies is subject to the provisions of §§ 84.34, 84.37, and 84.38.

§ 84.40 [Reserved]

Subpart E—Postsecondary Education

§ 84.41 Application of this subpart.

Subpart E applies to postsecondary education programs and activities, including postsecondary vocational education programs and activities, that receive or benefit from federal financial assistance and to recipients that operate, or that receive or benefit from federal financial assistance for the operation of, such programs or activities.

§ 84.42 Admissions and recruitment.

(a) *General.* Qualified handicapped persons may not, on the basis of handicap, be denied admission or be subjected to discrimination in admission or recruitment by a recipient to which this subpart applies.

(b) *Admissions.* In administering its admission policies, a recipient to which this subpart applies:

(1) May not apply limitations upon the number or proportion of handicapped persons who may be admitted;

(2) May not make use of any test or criterion for admission that has a disproportionate, adverse effect on handicapped persons or any class of handicapped persons unless (i) the test or criterion, as used by the recipient, has been validated as a predictor of success in the education program or activity in question and (ii) alternate tests or criteria that have a less disproportionate, adverse effect are not shown by the Director to be available;

(3) Shall assure itself that (i) admissions tests are selected and administered so as best to ensure that, when a test is administered to an applicant who has a handicap that impairs sensory, manual, or speaking skills, the test results accurately reflect the applicant's aptitude or achievement level or whatever other factor the test purports to measure, rather than reflecting the applicant's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure); (ii) admissions tests that are designed for persons with impaired sensory, manual, or speaking skills are offered as often and in as timely a manner as are other admissions tests; and (iii) admissions tests are administered in facilities that, on the whole, are accessible to handicapped persons; and

(4) Except as provided in paragraph (c) of this section, may not make preadmission inquiry as to whether an applicant for admission is a handicapped person but, after admission, may make inquiries on a confidential basis as to handicaps that may require accommodation.

(c) *Preadmission inquiry exception.* When a recipient is taking remedial action to correct the effects of past discrimination pursuant to § 84.6(a) or when a recipient is taking voluntary action to overcome the effects of conditions that resulted in limited participation in its federally assisted program or activity pursuant to § 84.6(b), the recipient may invite applicants for admission to indicate whether and to what extent they are handicapped, *Provided,* That:

(1) The recipient states clearly on any written questionnaire used for this purpose or makes clear orally if no written questionnaire is used that the information requested is intended for use solely in connection with its remedial action obligations or its voluntary action efforts; and

(2) The recipient states clearly that the information is being requested on a voluntary basis, that it will be kept confidential, that refusal to provide it will not subject the applicant to any adverse treatment, and that it will be used only in accordance with this part.

(d) *Validity studies.* For the purpose of paragraph (b)(2) of this section, a recipient may base prediction equations on first year grades, but shall conduct peri-

odic validity studies against the criterion of overall success in the education program or activity in question in order to monitor the general validity of the test scores.

§ 84.43 Treatment of students; general.

(a) No qualified handicapped student shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any academic, research, occupational training, housing, health, insurance, counseling, financial aid, physical education, athletics, recreation, transportation, other extracurricular, or other postsecondary education program or activity to which this subpart applies.

(b) A recipient to which this subpart applies that considers participation by students in education programs or activities not operated wholly by the recipient as part of, or equivalent to, an education program or activity operated by the recipient shall assure itself that the other education program or activity, as a whole, provides an equal opportunity for the participation of qualified handicapped persons.

(c) A recipient to which this subpart applies may not, on the basis of handicap, exclude any qualified handicapped student from any course, course of study, or other part of its education program or activity.

(d) A recipient to which this subpart applies shall operate its programs and activities in the most integrated setting appropriate.

§ 84.44 Academic adjustments.

(a) *Academic requirements.* A recipient to which this subpart applies shall make such modifications to its academic requirements as are necessary to ensure that such requirements do not discriminate or have the effect of discriminating, on the basis of handicap, against a qualified handicapped applicant or student. Academic requirements that the recipient can demonstrate are essential to the program of instruction being pursued by such student or to any directly related licensing requirement will not be regarded as discriminatory within the meaning of this section. Modifications may include changes in the length of time permitted for the completion of degree requirements, substitution of specific courses required for the completion of degree requirements, and adaptation of the manner in which specific courses are conducted.

(b) *Other rules.* A recipient to which this subpart applies may not impose upon handicapped students other rules, such as the prohibition of tape recorders in classrooms or of dog guides in campus buildings, that have the effect of limiting the participation of handicapped students in the recipient's education program or activity.

(c) *Course examinations.* In its course examinations or other procedures for evaluating students' academic achievement in its program, a recipient to which this subpart applies shall provide such methods for evaluating the achievement of students who have a handicap that impairs sensory, manual, or speaking skills as will best ensure that the results of the evaluation represents the student's achievement in the course, rather than reflecting the student's impaired sensory, manual, or speaking skills (except where such skills are the factors that the test purports to measure).

(d) *Auxiliary aids.* (1) A recipient to which this subpart applies shall take such steps as are necessary to ensure that no handicapped student is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination under the education program or activity operated by the recipient because of the absence of educational auxiliary aids for students with impaired sensory, manual, or speaking skills.

(2) Auxiliary aids may include taped texts, interpreters or other effective methods of making orally delivered materials available to students with hearing impairments, readers in libraries for students with visual impairments, classroom equipment adapted for use by students with manual impairments, and other similar services and actions. Recipients need not provide attendants, individually prescribed devices, readers for personal use or study, or other devices or services of a personal nature.

§ 84.45 Housing.

(a) *Housing provided by the recipient.* A recipient that provides housing to its nonhandicapped students shall provide comparable, convenient, and accessible housing to handicapped students at the same cost as to others. At the end of the transition period provided for in Subpart C, such housing shall be available in sufficient quantity and variety so that the scope of handicapped students' choice of living accommodations is, as a whole, comparable to that of nonhandicapped students.

(b) *Other housing.* A recipient that assists any agency, organization, or person in making housing available to any of its students shall take such action as may be necessary to assure itself that such housing is, as a whole, made available in a manner that does not result in discrimination on the basis of handicap.

§ 84.46 Financial and employment assistance to students.

(a) *Provision of financial assistance.* (1) In providing financial assistance to qualified handicapped persons, a recipient to which this subpart applies may not (i), on the basis of handicap, provide less assistance than is provided to nonhandicapped persons, limit eligibility for assistance, or otherwise discriminate or (ii) assist any entity or person that provides assistance to any of the recipient's students in a manner that discriminates against qualified handicapped persons on the basis of handicap.

(2) A recipient may administer or assist in the administration of scholarships, fellowships, or other forms of financial assistance established under wills, trusts, bequests, or similar legal instruments that require awards to be made on the basis of factors that discriminate or have the effect of discriminating on the basis of handicap only if the overall effect of the award of scholarships, fellowships, and other forms of financial assistance is not discriminatory on the basis of handicap.

(b) *Assistance in making available outside employment.* A recipient that assists any agency, organization, or person in providing employment opportunities to any of its students shall assure itself that such employment opportunities, as a whole, are made available in a manner that would not violate Subpart B if they were provided by the recipient.

(c) *Employment of students by recipients.* A recipient that employs any of its students may not do so in a manner that violates Subpart B.

§ 84.47 Nonacademic services.

(a) *Physical education and athletics.* (1) In providing physical education courses and athletics and similar programs and activities to any of its students, a recipient to which this subpart applies may not discriminate on the basis of handicap. A recipient that offers physical education courses or that operates or sponsors intercollegiate, club, or intramural athletics shall provide to qualified handicapped students an equal opportunity for participation in these activities.

(2) A recipient may offer to handicapped students physical education and athletic activities that are separate or different only if separation or differentiation is consistent with the requirements of §84.43(d) and only if no qualified handicapped student is denied the opportunity to compete for teams or to participate in courses that are not separate or different.

(b) *Counseling and placement services.* A recipient to which this subpart applies that provides personal, academic, or vocational counseling, guidance, or placement services to its students shall provide these services without discrimination on the basis of handicap. The recipient shall ensure that qualified handicapped students are not counseled toward more restrictive career objectives than are nonhandicapped students with similar interests and abilities. This requirement does not preclude a recipient from providing factual information about licensing and certification requirements that may present obstacles to handicapped persons in their pursuit of particular careers.

(c) *Social organizations.* A recipient that provides significant assistance to fraternities, sororities, or similar organizations shall assure itself that the membership practices of such organizations do not permit discrimination otherwise prohibited by this subpart.

§§ 84.48—84.50 [Reserved]

Subpart F—Health, Welfare, and Social Services

§ 84.51 Application of this subpart.

Subpart F applies to health, welfare, and other social service programs and activities that receive or benefit from federal financial assistance and to recipients that operate, or that receive or benefit from federal financial assistance for the operation of, such programs or activities.

§ 84.52 Health, welfare, and other social services.

(a) *General.* In providing health, welfare, or other social services or benefits, a recipient may not, on the basis of handicap:

(1) Deny a qualified handicapped person these benefits or services;

(2) Afford a qualified handicapped person an opportunity to receive benefits or services that is not equal to that offered nonhandicapped persons;

(3) Provide a qualified handicapped person with benefits or services that are not as effective (as defined in § 84.4(b)) as the benefits or services provided to others;

(4) Provide benefits or services in a manner that limits or has the effect of limiting the participation of qualified handicapped persons; or

(5) Provide different or separate benefits or services to handicapped persons except where necessary to provide qualified handicapped persons with benefits and services that are as effective as those provided to others.

(b) *Notice.* A recipient that provides notice concerning benefits or services or written material concerning waivers of rights or consent to treatment shall take such steps as are necessary to ensure that qualified handicapped persons, including those with impaired sensory or speaking skills, are not denied effective notice because of their handicap.

(c) *Emergency treatment for the hearing impaired.* A recipient hospital that provides health services or benefits shall establish a procedure for effective communication with persons with impaired hearing for the purpose of providing emergency health care.

(d) *Auxiliary aids.* (1) A recipient to which this subpart applies that employs fifteen or more persons shall provide appropriate auxiliary aids to persons with impaired sensory, manual, or speaking skills, where necessary to afford such persons an equal opportunity to benefit from the service in question.

(2) The Director may require recipients with fewer than fifteen employees to provide auxiliary aids where the provision of aids would not significantly impair the ability of the recipient to provide its benefits or services.

(3) For the purpose of this paragraph, auxiliary aids may include brailled and taped material, interpreters, and other aids for persons with impaired hearing or vision.

§ 84.53 Drug and alcohol addicts.

A recipient to which this subpart applies that operates a general hospital or outpatient facility may not discriminate in admission or treatment against a drug or alcohol abuser or alcoholic who is suffering from a medical condition, because of the person's drug or alcohol abuse or alcoholism.

§ 84.54 Education of institutionalized persons.

A recipient to which this subpart applies and that operates or supervises a program or activity for persons who are institutionalized because of handicap shall ensure that each qualified handicapped person, as defined in § 84.3(k)(2), in its program or activity is provided an appropriate education, as defined in § 84.33(b). Nothing in this section shall be interpreted as altering in any way the obligations of recipients under Subpart D.

§§ 84.55–84.60 [Reserved]

Subpart G—Procedures

§ 84.61 Procedures.

The procedural provisions applicable to title VI of the Civil Rights Act of 1964 apply to this part. These procedures are found in §§ 80.6–80.10 and Part 81 of this Title.

§§ 84.62–84.99 [Reserved]

NOTE: Incorporation by reference provisions approved by the Director of the Federal Register, May 27, 1975. Incorporated documents are on file at the Office of the Federal Register.

APPENDIX A—ANALYSIS OF FINAL REGULATION

SUBPART A—GENERAL PROVISIONS

Definitions—1. *"Recipient".* Section 84.23 contains definitions used throughout the regulation. Most of the comments concerning § 84.3(f), which contains the definition of "recipient," commended the inclusion of recipients whose sole source of federal financial assistance is Medicaid. The Secretary believes that such Medicaid providers should be regarded as recipients under the statute and the regulation and should be held individually responsible for administering services in a nondiscriminatory fashion. Accordingly, § 84.3(f) has not been changed. Small Medicaid providers, however, are exempt from some of the regulation's administrative provisions (those that apply to recipients with fifteen or more employees). And such recipients will be permitted to refer patients to accessible facilities in certain limited circumstances under revised § 84.22(b). The Secretary recognizes the difficulties involved in federal enforcement of this regulation with respect to thousands of individual Medicaid providers. As in the case of title VI of the Civil Rights Act of 1964, the Office for Civil Rights will concentrate its compliance efforts on the state Medicaid agencies and will look primarily to them to ensure compliance by individual providers.

One other comment requested that the regulation specify that nonpublic elementary and secondary schools that are not otherwise recipients do not become recipients by virtue of the fact their students participate in certain federally funded programs. The Secretary believes it unnecessary to amend the regulation in this regard, because almost identical language in the Department's regulations implementing title VI and title IX of the Education Amendments of 1972 has consistently been interpreted so as not to render such schools recipients. These schools, however, are indirectly subject to the substantive requirements of this regulation through the application of § 84.4(b)(iv), which prohibits recipients from assisting agencies that discriminate on the basis of handicap in providing services to beneficiaries of the recipients' programs.

2. *"Federal financial assistance".* In § 84.3(h), defining federal financial assistance, a clarifying change has been made: procurement contracts are specifically excluded. They are covered, however, by the Department of Labor's regulation under section 503. The Department has never considered such contracts to be contracts of assistance; the explicit exemption has been added only to avoid possible confusion.

The proposed regulation's exemption of contracts of insurance or guaranty has been retained. A number of comments argued for its deletion on the ground that section 504, unlike title VI and title IX, contains no statutory exemption for such contracts. There is no indication, however, in the legislative history of the Rehabilitation Act of 1973 or of the amendments to that Act in 1974, that Congress intended section 504 to have a broader application, in terms of federal financial assistance, than other civil rights statutes. Indeed, Congress directed that section 504 be implemented in the same manner as titles VI and IX. In view of the long established exemption of contracts of insurance or guaranty under title VI, we think it unlikely that Congress intended section 504 to apply to such contracts.

In its May 1976 Notice of Intent, the Department suggested that the arrangement under which individual practitioners, hospitals, and other facilities receive reimbursement for providing services to beneficiaries under Part B of title XVIII of the Social Security Act (Medicare) constitutes a contract of insurance or guaranty and thus falls within the exemption from the regulation. This explanation oversimplified the Department's view of whether Medicare Part B constitutes Federal financial assistance. The Department's position has consistently been that, whether or not Medicare Part B arrangements involve a contract of insurance or guaranty, no Federal financial assistance flows from the Department to the doctor or other practitioner under the program, since Medicare Part B—like other social security programs—is basically a program of payments to direct beneficiaries.

3. *"Handicapped person".* Section 84.3(j), which defines the class of persons protected under the regulation, has not been substantially changed. The definition of handicapped person in paragraph (j)(1) conforms to the statutory definition of handicapped person that is applicable to section 504, as set forth in section 111(a) of the Rehabilitation Act Amendments of 1974, Pub. L. 93-516.

The first of the three parts of the statutory and regulatory definition includes any person who has a physical or mental impairment that substantially limits one or more major life activities. Paragraph (j)(2)(i) further defines physical or mental impairments. The definition does not set forth a list of specific diseases and conditions that constitute physical or mental impairments because of the difficulty of ensuring the comprehensiveness of any such list. The term includes, however, such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and, as discussed below, drug addiction and alcoholism.

It should be emphasized that a physical or mental impairment does not constitute a handicap for purposes of section 504 unless its severity is such that it results in a substantial limitation of one or more major life activities. Several comments observed the lack of any definition in the proposed regulation of the phrase "substantially limits." The Department does not believe that a definition of this term is possible at this time.

A related issue raised by several comments is whether the definition of handicapped person is unreasonably broad. Comments suggested narrowing the definition in various ways. The most common recommendation was that only "traditional" handicaps be covered. The Department continues to believe, however, that it has no flexibility within the statutory definition to limit the term to persons who have those severe, permanent,

or progressive conditions that are most commonly regarded as handicaps. The Department intends, however, to give particular attention in its enforcement of section 504 to eliminating discrimination against persons with the severe handicaps that were the focus of concern in the Rehabilitation Act of 1973.

The definition of handicapped person also includes specific limitations on what persons are classified as handicapped under the regulation. The first of the three parts of the definition specifies that only physical and mental handicaps are included. Thus, environmental, cultural, and economic disadvantage are not in themselves covered; nor are prison records, age, or homosexuality. Of course, if a person who has any of these characteristics also has a physical or mental handicap, the person is included within the definition of handicapped person.

In paragraph (j)(2)(i), physical or mental impairment is defined to include, among other impairments, specific learning disabilities. The Department will interpret the term as it is used in section 602 of the Education of the Handicapped Act, as amended. Paragraph (15) of section 602 uses the term "specific learning disabilities" to describe such conditions as perceptual handicaps, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.

Paragraph (j)(2)(i) has been shortened, but not substantively changed, by the deletion of clause (C), which made explicit the inclusion of any condition which is mental or physical but whose precise nature is not at present known. Clauses (A) and (B) clearly comprehend such conditions.

The second part of the statutory and regulatory definition of handicapped person includes any person who has a record of a physical or mental impairment that substantially limits a major life activity. Under the definition of "record" in paragraph (j)(2)(iii), persons who have a history of a handicapping condition but no longer have the condition, as well as persons who have been incorrectly classified as having such a condition, are protected from discrimination under section 504. Frequently occurring examples of the first group are persons with histories of mental or emotional illness, heart disease, or cancer; of the second group, persons who have been misclassified as mentally retarded.

The third part of the statutory and regulatory definition of handicapped person includes any person who is regarded as having a physical or mental impairment that substantially limits one or more major life activities. It includes many persons who are ordinarily considered to be handicapped but who do not technically fall within the first two parts of the statutory definition, such as persons with a limp. This part of the definition also includes some persons who might not ordinarily be considered handicapped, such as persons with disfiguring scars, as well as persons who have no physical or mental impairment but are treated by a recipient as if they were handicapped.

4. *Drug addicts and alcoholics.* As was the case during the first comment period, the issue of whether to include drug addicts and alcoholics within the definition of handicapped person was of major concern to many commenters. The arguments presented on each side of the issue were similar during the two comment periods, as was the preference of commenters for exclusion of this group of persons. While some comments reflected misconceptions about the implications of including alcoholics and drug addicts within the scope of the regulation, the Secretary understands the concerns that underlie the comments on this question and recognizes that application of section 504 to active alcoholics and drug addicts presents sensitive and difficult questions that must be taken into account in interpretation and enforcement.

The Secretary has carefully examined the issue and has obtained a legal opinion from the Attorney General. That opinion concludes that drug addiction and alcoholism are "physical or mental impairments" within the meaning of section 7(6) of the Rehabilitation Act of 1973, as amended, and that drug addicts and alcoholics are therefore handicapped for purposes of section 504 if their impairment substantially limits one of their major life activities. The Secretary therefore believes that he is without authority to exclude these conditions from the definition. There is a medical and legal consensus that alcoholism and drug addiction are diseases, although there is disagreement as to whether they are primarily mental or physical. In addition, while Congress did not focus specifically on the problems of drug addiction and alcoholism in enacting section 504, the committees that considered the Rehabilitation Act of 1973 were made aware of the Department's long-standing practice of treating addicts and alcoholics as handicapped individuals eligible for rehabilitation services under the Vocational Rehabilitation Act.

The Secretary wishes to reassure recipients that inclusion of addicts and alcoholics within the scope of the regulation will not lead to the consequences feared by many commenters. It cannot be emphasized too strongly that the statute and the regulation apply only to discrimination against qualified handicapped persons solely by reason of their handicap. The fact that drug addiction and alcoholism may be handicaps does not mean that these conditions must be ignored in determining whether an individual is qualified for services or employment opportunities. On the contrary, a recipient may hold a drug addict or alcoholic to the same standard of performance and behavior to which it holds others, even if any unsatisfactory performance or behavior is related to the person's drug addiction or alcoholism. In other words, while an alcoholic or drug addict may not be denied services or disqualified from employment solely because of his or her condition, the behavioral manifestations of the condition may be taken into account in determining whether he or she is qualified.

With respect to the employment of a drug addict or alcoholic, if it can be shown that the addiction or alcoholism prevents successful performance of the job, the person need not be provided the employment opportunity in question. For example, in making employment decisions, a recipient may judge addicts and alcoholics on the same basis it judges all other applicants and employees. Thus, a recipient may consider—for all applicants including drug addicts and alcoholics—past personnel records, absenteeism, disruptive, abusive, or dangerous behavior, violations of rules and unsatisfactory work performance. Moreover, employers may enforce rules prohibiting the possession or use of alcohol or drugs in the work-place, provided that such rules are enforced against all employees.

With respect to services, there is evidence that drug addicts and alcoholics are often denied treatment at hospitals for conditions unrelated to their addiction or alcoholism. In addition, some addicts and alcoholics have been denied emergency treatment. These practices have been specifically prohibited by section 407 of the Drug Abuse Office and Treatment Act of 1972 (21 U.S.C. 1174) and section 321 of the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970 (42 U.S.C. 4581), as amended. These statutory provisions are also administered by the Department's Office for Civil Rights and are implemented in § 84.53 of this regulation.

With respect to other services, the implications of coverage of alcoholics and drug addicts are two-fold: first, no person may be excluded from services solely by reason of the presence or history of these conditions; second, to the extent that the manifestations of the condition prevent the person from meeting the basic eligibility requirements of the program or cause substantial interference with the operation of the program, the condition may be taken into consideration. Thus, a college may not exclude an addict or alcoholic as a student, on the basis of addiction or alcoholism, if the person can successfully participate in the education program and complies with the rules of the college and if his or her behavior does not impede the performance of other students.

Of great concern to many commenters was the question of what effect the inclusion of drug addicts and alcoholics as handicapped persons would have on school disciplinary rules prohibiting the use or possession of drugs or alcohol by students. Neither such rules nor their application to drug addicts or alcoholics is prohibited by this regulation, provided that the rules are enforced evenly with respect to all students.

5. *"Qualified handicapped person."* Paragraph (k) of § 84.3 defines the term "qualified handicapped person." Throughout the regulation, this term is used instead of the statutory term "otherwise qualified handicapped person." The Department believes that the omission of the word "otherwise" is necessary in order to comport with the intent of the statute because, read literally, "otherwise" qualified handicapped persons include persons who are qualified except for their handicap, rather than in spite of their handicap. Under such a literal reading, a blind person possessing all the qualifications for driving a bus except sight could be said to be "otherwise qualified" for the job of driving. Clearly, such a result was not intended by Congress. In all other respects, the terms "qualified" and "otherwise qualified" are intended to be interchangeable.

Section 84.3(k)(1) defines a qualified handicapped person with respect to employment as a handicapped person who can, with reasonable accommodation, perform the essential functions of the job in question. The term "essential functions" does not appear in the corresponding provision of the Department of Labor's section 503 regulation, and a few commenters objected to its inclusion on the ground that a handicapped person should be able to perform all job tasks. However, the Department believes that inclusion of the phrase is useful in emphasizing that handicapped persons should not be disqualified simply because they may have difficulty in performing tasks that bear only a marginal relationship to a particular job. Further, we are convinced that inclusion of the phrase is not inconsistent with the Department of Labor's application of its definition.

Certain commenters urged that the definition of qualified handicapped person be amended so as explicitly to place upon the employer the burden of showing that a particular mental or physical characteristic is essential. Because the same result is achieved by the requirement contained in paragraph (a) of § 84.13, which requires an employer to establish that any selection criterion that tends to screen out handicapped persons is job-related, that recommendation has not been followed.

Section 84.3(k)(2) (formerly § 84.3(k)(3)) defines qualified handicapped person, with respect to preschool, elementary, and secondary programs, in terms of age. Several

commenters recommended that eligibility for the services be based upon the standard of substantial benefit, rather than age, because of the need of many handicapped children for early or extended services if they are to have an equal opportunity to benefit from education programs. No change has been made in this provision, again because of the extreme difficulties in administration that would result from the choice of the former standard. Under the remedial action provisions of § 84.6(a)(3), however, persons beyond the age limits prescribed in § 84.3(k)(2) may in appropriate cases be required to be provided services that they were formerly denied because of a recipient's violation of section 504.

Section 84.3(k)(2) states that a handicapped person is qualified for preschool, elementary, or secondary services if the person is of an age at which nonhandicapped persons are eligible for such services or at which state law mandates the provision of educational services to handicapped persons. In addition, the extended age ranges for which recipients must provide full educational opportunity to all handicapped persons in order to be eligible for assistance under the Education of the Handicapped Act—generally, 3–18 as of September 1978, and 3–21 as of September 1980 are incorporated by reference in this paragraph.

Section 84.3(k)(3) (formerly § 84.3(k)(2)) defines qualified handicapped person with respect to postsecondary educational programs. As revised, the paragraph means that both academic and technical standards must be met by applicants to these programs. The term "technical standards" refers to all nonacademic admissions criteria that are essential to participation in the program in question.

6. *General prohibitions against discrimination.* Section 84.4 contains general prohibitions against discrimination applicable to all recipients of assistance from this Department.

Paragraph (b)(1)(i) prohibits the exclusion of qualified handicapped persons from aids, benefits, or services, and paragraph (ii) requires that equal opportunity to participate or benefit be provided. Paragraph (iii) requires that services provided to handicapped persons be as effective as those provided to the nonhandicapped. In paragraph (iv), different or separate services are prohibited except when necessary to provide equally effective benefits.

In this context, the term "equally effective," defined in paragraph (b)(2), is intended to encompass the concept of equivalent, as opposed to identical, services and to acknowledge the fact that, in order to meet the individual needs of handicapped persons to the same extent that the corresponding needs of nonhandicapped persons are met, adjustments to regular programs or the provision of different programs may sometimes be necessary. For example, a welfare office that uses the telephone for communicating with its clients must provide alternative modes of communicating with its deaf clients. This standard parallels the one established under title VI of Civil Rights Act of 1964 with respect to the provision of educational services to students whose primary language is not English. See *Lau* v. *Nichols*, 414 U.S. 563 (1974). To be equally effective, however, an aid, benefit, or service need not produce equal results; it merely must afford an equal opportunity to achieve equal results.

It must be emphasized that, although separate services must be required in some instances, the provision of unnecessarily separate or different services is discriminatory. The addition to paragraph (b)(2) of the phrase "in the most integrated setting appropriate to the person's needs" is intended to reinforce this general concept. A new paragraph (b)(3) has also been added to § 84.4, requiring recipients to give qualified handicapped persons the option of participating in regular programs despite the existence of permissibly separate or different programs. The requirement has been reiterated in §§ 84.38 and 84.47 in connection with physical education and athletics programs.

Section 84.4(b)(1)(v) prohibits a recipient from supporting another entity or person that subjects participants or employees in the recipient's program to discrimination on the basis of handicap. This section would, for example, prohibit financial support by a recipient to a community recreational group or to a professional or social organization that discriminates against handicapped persons. Among the criteria to be considered in each case are the substantiality of the relationship between the recipient and the other entity, including financial support by the recipient, and whether the other entity's activities relate so closely to the recipient's program or activity that they fairly should be considered activities of the recipient itself. Paragraph (b)(1)(vi) was added in response to comment in order to make explicit the prohibition against denying qualified handicapped persons the opportunity to serve on planning and advisory boards responsible for guiding federally assisted programs or activities.

Several comments appeared to interpret § 84.4(b)(5), which proscribes discriminatory site selection, to prohibit a recipient that is located on hilly terrain from erecting any new buildings at its present site. That, of course, is not the case. This paragraph is not intended to apply to construction of additional buildings at an existing site. Of course, any such facilities must be made accessible in accordance with the requirements of § 84.23.

7. *Assurances of compliance.* Section 84.5(a) requires a recipient to submit to the Director an assurance that each of its programs and activities receiving or benefiting from federal financial assistance from this Department will be conducted in compliance with this regulation. To facilitate the submission of assurances by thousands of Medicaid providers, the Department will follow the title VI procedures of accepting, in lieu of assurances, certification on Medicaid vouchers. Many commenters also sought relief from the paperwork requirements imposed by the Department's enforcement of its various civil rights responsibilities by requesting the Department to issue one form incorporating title VI, title IX, and section 504 assurances. The Secretary is sympathetic to this request. While it is not feasible to adopt a single civil rights assurance form at this time, the Office for Civil Rights will work toward that goal.

8. *Private rights of action.* Several comments urged that the regulation incorporate provision granting beneficiaries a private right of action against recipients under section 504. To confer such a right is beyond the authority of the executive branch of government. There is, however, case law holding that such a right exists. *Lloyd* v. *Regional Transportation Authority*, 548 F. 2d 1277 (7th Cir. 1977); *see Hairston* v. *Drosick*, Civil No. 75-0691 (S.D. W. Va., Jan. 14, 1976); *Gurmankin* v. *Castanzo*, 411 F. Supp. 982 (E.D. Pa. 1976); *cf. Lau* v. *Nichols*, *supra*.

9. *Remedial action.* Where there has been a finding of discrimination, § 84.6 requires a recipient to take remedial action to overcome the effects of the discrimination. Actions that might be required under paragraph (a)(1) include provision of services to persons previously discriminated against, reinstatement of employees, and development of a remedial action plan. Should a recipient fail to take required remedial action, the ultimate sanctions of court action or termination of federal financial assistance may be imposed.

Paragraph (a)(2) extends the responsibility for taking remedial action to a recipient that exercises control over a noncomplying recipient. Paragraph (a)(3) also makes clear that handicapped persons who are not in the program at the time that remedial action is required to be taken may also be the subject of such remedial action. This paragraph has been revised in response to comments in order to include persons who would have been in the program if discriminatory practices had not existed. Paragraphs (a)(1), (2), and (3) have also been amended in response to comments to make plain that, in appropriate cases, remedial action might be required to redress clear violations of the statute itself that occurred before the effective date of this regulation.

10. *Voluntary action.* In § 84.6(b), the term "voluntary action" has been substituted for the term "affirmative action" because the use of the latter term led to some confusion. We believe the term "voluntary action" more accurately reflects the purpose of the paragraph. This provision allows action, beyond that required by the regulation, to overcome conditions that led to limited participation by handicapped persons, whether or not the limited participation was caused by any discriminatory actions on the part of the recipient. Several commenters urged that paragraphs (a) and (b) be revised to require remedial action to overcome effects of prior discriminatory practices regardless of whether there has been an express finding of discrimination. The self-evaluation requirement in paragraph (c) accomplishes much the same purpose.

11. *Self-evaluation.* Paragraph (c) requires recipients to conduct a self-evaluation in order to determine whether their policies or practices may discriminate against handicapped persons and to take steps to modify any discriminatory policies and practices and their effects. The Department received many comments approving of the addition to paragraph (c) of a requirement that recipients seek the assistance of handicapped persons in the self-evaluation process. This paragraph has been further amended to require consultation with handicapped persons or organizations representing them before recipients undertake the policy modifications and remedial steps prescribed in paragraphs (c)(ii) and (iii).

Paragraph (c)(2), which sets forth the recordkeeping requirements concerning self-evaluation, now applies only to recipients with fifteen or more employees. This change was made as part of an effort to reduce unnecessary or counterproductive administrative obligations on small recipients. For those recipients required to keep records, the requirements have been made more specific; records must include a list of persons consulted and a description of areas examined, problems identified, and corrective steps taken. Moreover, the records must be made available for public inspection.

12. *Grievance procedure.* Section 84.7 (formerly § 84.8) requires recipients with fifteen or more employees to designate an individual responsible for coordinating its compliance efforts and to adopt a grievance procedure. Two changes were made in the section in response to comment. A general requirement that appropriate due process procedures be followed has been added. It was decided that the details of such procedures could not at this time be specified because of the varied nature of the persons and entities who must establish the procedures and of the programs to which they apply. A sentence was also added to make clear that

grievance procedures are not required to be made available to unsuccessful applicants for employment or to applicants for admission to colleges and universities.

The regulation does not require that grievance procedures be exhausted before recourse is sought from the Department. However, the Secretary believes that it is desirable and efficient in many cases for complainants to seek resolution of their complaints and disputes at the local level and therefore encourages them to use available grievance procedures.

A number of comments asked whether compliance with this section or the notice requirements of § 84.8 could be coordinated with comparable action required by the title IX regulation. The Department encourages such efforts.

13. *Notice.* Section 84.8 (formerly § 84.9) sets forth requirements for dissemination of statements of nondiscrimination policy by recipients.

It is important that both handicapped persons and the public at large be aware of the obligations of recipients under section 504. Both the Department and recipients have responsibilities in this regard. Indeed the Department intends to undertake a major public information effort to inform persons of their rights under section 504 and this regulation. In § 84.8 the Department has sought to impose a clear obligation on major recipients to notify beneficiaries and employees of the requirements of section 504, without dictating the precise way in which this notice must be given. At the same time, we have avoided imposing requirements on small recipients (those with fewer than fifteen employees) that would create unnecessary and counterproductive paperwork burdens on them and unduly stretch the enforcement resources of the Department.

Section 84.8(a), as simplified, requires recipients with fifteen or more employees to take appropriate steps to notify beneficiaries and employees of the recipient's obligations under section 504. The last sentence of § 84.8 (a) has been revised to list possible, rather than required, means of notification. Section 84.8(b) requires recipients to include a notification of their policy of nondiscrimination in recruitment and other general information materials.

In response to a number of comments, § 84.8 has been revised to delete the requirements of publication in local newspapers, which has proved to be both troublesome and ineffective. Several commenters suggested that notification on separate forms be allowed until present stocks of publications and forms are depleted. The final regulation explicitly allows this method of compliance. The separate form should, however, be included with each significant publication or form that is distributed.

Former § 84.9(b)(2), which prohibited the use of materials that might give the impression that a recipient excludes qualified handicapped persons from its program, has been deleted. The Department is convinced by the comments that this provision is unnecessary and difficult to apply. The Department encourages recipients, however, to include in their recruitment and other general information materials photographs of handicapped persons and ramps and other features of accessible buildings.

Under new § 84.9 the Director may, under certain circumstances, require recipients with fewer than fifteen employees to comply with one or more of these requirements. Thus, if experience shows a need for imposing notice or other requirements on particular recipients or classes of small recipients, the Department is prepared to expand the coverage of these sections.

14. *Inconsistent State laws.* Section 84.10 (a) states that compliance with the regulation is not excused by state or local laws limiting the eligibility of qualified handicapped persons to receive services or to practice an occupation. The provision thus applies only with respect to state or local laws that unjustifiably differentiate on the basis of handicap.

Paragraph (b) further points out that the presence of limited employment opportunities in a particular profession does not excuse a recipient from complying with the regulation. Thus, a law school could not deny admission to a blind applicant because blind lawyers may find it more difficult to find jobs than do nonhandicapped lawyers.

Subpart B—Employment Practices

Subpart B prescribes requirements for nondiscrimination in the employment practices of recipients of federal financial assistance administered by the Department. This subpart is consistent with the employment provisions of the Department's regulation implementing title IX of the Education Amendments of 1972 (45 CFR Part 86) and the regulation of the Department of Labor under section 503 of the Rehabilitation Act, which requires certain Federal contractors to take affirmative action in the employment and advancement of qualified handicapped persons. All recipients subject to title IX are also subject to this regulation. In addition, many recipients subject to this regulation receive federal procurement contracts in excess of $2500 and are therefore also subject to section 503.

15. *Discriminatory practices.* Section 84.11 sets forth general provisions with respect to discrimination in employment. A new paragraph (a)(2) has been added to clarify the employment obligations of recipients that receive federal funds under Part B of the Education of the Handicapped Act, as amended (EHA). Section 606 of the EHA obligates elementary or secondary school systems that receive EHA funds to take positive steps to employ and advance in employment qualified handicapped persons. This obligation is similar to the nondiscrimination requirement of section 504 but requires recipients to take additional steps to hire and promote handicapped persons. In enacting section 606 Congress chose the words "positive steps" instead of "affirmative action" advisedly and did not intend section 606 to incorporate the types of activities required under Executive Order 11246 (affirmative action on the basis of race, color, sex, or national origin) or under sections 501 and 503 of the Rehabilitation Act of 1973.

Paragraph (b) of § 84.11 sets forth the specific aspects of employment covered by the regulation. Paragraph (c) provides that inconsistent provisions of collective bargaining agreements do not excuse noncompliance.

16. *Reasonable accommodation.* The reasonable accommodation requirement of § 84.12 generated a substantial number of comments. The Department remains convinced that its approach is both fair and effective. Moreover, the Department of Labor reports that it has experienced little difficulty in administering the requirement of reasonable accommodation. The provision therefore remains basically unchanged from the proposed regulation.

Section 84.12 requires a recipient to make reasonable accommodation to the known physical or mental limitations of a handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program. Where a handicapped person is not qualified to perform a particular job, where reasonable accommodation does not overcome the effects of a person's handicap, or where reasonable accommodation causes undue hardship to the employer, failure to hire or promote the handicapped person will not be considered discrimination.

Section 84.12(b) lists some of the actions that constitute reasonable accommodation. The list is neither all-inclusive nor meant to suggest that employers must follow all of the actions listed.

Reasonable accommodation includes modification of work schedules, including part-time employment, and job restructuring. Job restructuring may entail shifting nonessential duties to other employees. In other cases, reasonable accommodation may include physical modifications or relocation of particular offices or jobs so that they are in facilities or parts of facilities that are accessible to and usable by handicapped persons. If such accommodations would cause undue hardship to the employer, they need not be made.

Paragraph (c) of this section sets forth the factors that the Office for Civil Rights will consider in determining whether an accommodation necessary to enable an applicant or employee to perform the duties of a job would impose an undue hardship. The weight given to each of these factors in making the determination as to whether an accommodation constitutes undue hardship will vary depending on the facts of a particular situation. Thus, a small day-care center might not be required to expend more than a nominal sum, such as that necessary to equip a telephone for use by a secretary with impaired hearing, but a large school district might be required to make available a teacher's aide to a blind applicant for a teaching job. Further, it might be considered reasonable to require a state welfare agency to accommodate a deaf employee by providing an interpreter, while it would constitute an undue hardship to impose that requirement on a provider of foster home care services.

The reasonable accommodation standard in § 84.12 is similar to the obligation imposed upon federal contractors in the regulation implementing section 503 of the Rehabilitation Act of 1973, administered by the Department of Labor. Although the wording of the reasonable accommodation provisions of the two regulations is not identical, the obligation that the two regulations impose is the same, and the federal government's policy in implementing the two sections will be uniform. The Department adopted the factors listed in paragraph (c) instead of the "business necessity" standard of the Labor regulation because that term seemed inappropriate to the nature of the programs operated by the majority of institutions subject to this regulation, e.g., public school systems, hospitals, colleges and universities, nursing homes, day-care centers, and welfare offices. The factors listed in paragraph (c) are intended to make the rationale underlying the business necessity standard applicable to and understandable by recipients of HEW funds.

17. *Tests and selection criteria.* Revised § 84.13(a) prohibits employers from using test or other selection criteria that screen out or tend to screen out handicapped persons unless the test or criterion is shown to be job-related and alternative tests or criteria that do not screen out or tend to screen out as many handicapped persons are not shown by the Director to be available. This paragraph is an application of the principle established under title VII of the Civil Rights Act of 1964 in *Griggs* v. *Duke Power Company*, 401 U.S. 424 (1971).

Under the proposed section, a statistical showing of adverse impact on handicapped persons was required to trigger an employer's obligation to show that employment criteria

and qualifications relating to handicap were necessary. This requirement was changed because the small number of handicapped persons taking tests would make statistical showings of "disproportionate, adverse effect" difficult and burdensome. Under the altered, more workable provision, once it is shown that an employment test substantially limits the opportunities of handicapped persons, the employer must show the test to be job-related. A recipient is no longer limited to using predictive validity studies as the method for demonstrating that a test or other selection criterion is in fact job-related. Nor, in all cases, are predictive validity studies sufficient to demonstrate that a test or criterion is job-related. In addition, § 84.13(a) has been revised to place the burden on the Director, rather than the recipient, to identify alternate tests.

Section 84.13(b) requires that a recipient take into account that some tests and criteria depend upon sensory, manual, or speaking skills that may not themselves be necessary to the job in question but that may make the handicapped person unable to pass the test. The recipient must select and administer tests so as best to ensure that the test will measure the handicapped person's ability to perform on the job rather than the person's ability to see, hear, speak, or perform manual tasks, except, of course, where such skills are the factors that the test purports to measure. For example, a person with a speech impediment may be perfectly qualified for jobs that do not or need not, with reasonable accommodation, require ability to speak clearly. Yet, if given an oral test, the person will be unable to perform in a satisfactory manner. The test results will not, therefore, predict job performance but instead will reflect impaired speech.

18. *Preemployment inquiries.* Section 84.14, concerning preemployment inquiries, generated a large number of comments. Commenters representing handicapped persons strongly favored a ban on preemployment inquiries on the ground that such inquiries are often used to discriminate against handicapped persons and are not necessary to serve any legitimate interests of employers. Some recipients, on the other hand, argued that preemployment inquiries are necessary to determine qualifications of the applicant, safety hazards caused by a particular handicapping condition, and accommodations that might be required.

The Secretary has concluded that a general prohibition of preemployment inquiries is appropriate. However, a sentence has been added to paragraph (a) to make clear that an employer may inquire into an applicant's ability to perform job-related tasks but may not ask if the person has a handicap. For example, an employer may not ask on an employment form if an applicant is visually impaired but may ask if the person has a current driver's license (if that is a necessary qualification for the position in question). Similarly, employers may make inquiries about an applicant's ability to perform a job safely. Thus, an employer may not ask if an applicant is an epileptic but may ask whether the person can perform a particular job without endangering other employees.

Section 84.14(b) allows preemployment inquiries only if they are made in conjunction with required remedial action to correct past discrimination, with voluntary action to overcome past conditions that have limited the participation of handicapped persons, or with obligations under section 503 of the Rehabilitation Act of 1973. In these instances, paragraph (b) specifies certain safeguards that must be followed by the employer.

Finally, the revised provision allows an employer to condition offers of employment to handicapped persons on the results of medical examinations, so long as the examinations are administered to all employees in a nondiscriminatory manner and the results are treated on a confidential basis.

19. *Specific acts of Discrimination.* Sections 84.15 (recruitment), 84.16 (compensation), 84.17 (job classification and structure) and 84.18 (fringe benefits) have been deleted from the regulation as unnecessarily duplicative of § 84.11 (discrimination prohibited). The deletion of these sections in no way changes the substantive obligations of employers subject to this regulation from those set forth in the July 16 proposed regulation. These deletions bring the regulation closer in form to the Department of Labor's section 503 regulation.

Proposed § 84.18, concerning fringe benefits, had allowed for differences in benefits or contributions between handicapped and nonhandicapped persons in situations only where such differences could be justified on an actuarial basis. Section 84.11 simply bars discrimination in providing fringe benefits and does not address the issue of actuarial differences. The Department believes that currently available data and experience do not demonstrate a basis for promulgating a regulation specifically allowing for differences in benefits or contributions.

Subpart C—Program Accessibility

In general, Subpart C prohibits the exclusion of qualified handicapped persons from federally assisted programs or activities because a recipient's facilities are inaccessible or unusable.

20. *Existing facilities.* Section 84.22 maintains the same standard for nondiscrimination in regard to existing facilities as was included in the proposed regulation. The section states that a recipient's program or activity, when viewed in its entirety, must be readily accessible to and usable by handicapped persons. Paragraphs (a) and (b) make clear that a recipient is not required to make each of its existing facilities accessible to handicapped persons if its program as a whole is accessible. Accessibility to the recipient's program or activity may be achieved by a number of means, including redesign of equipment, reassignment of classes or other services to accessible buildings, and making aides available to beneficiaries. In choosing among methods of compliance, recipients are required to give priority consideration to methods that will be consistent with provision of services in the most appropriate integrated setting. Structural changes in existing facilities are required only where there is no other feasible way to make the recipient's program accessible.

Under § 84.22, a university does not have to make all of its existing classroom buildings accessible to handicapped students if some of its buildings are already accessible and if it is possible to reschedule or relocate enough classes so as to offer all required courses and a reasonable selection of elective courses in accessible facilities. If sufficient relocation of classes is not possible using existing facilities, enough alterations to ensure program accessibility are required. A university may not exclude a handicapped student from a specifically requested course offering because it is not offered in an accessible location, but it need not make every section of that course accessible.

Commenters representing several institutions of higher education have suggested that it would be appropriate for one postsecondary institution in a geographical area to be made accessible to handicapped persons and for other colleges and universities in that area to participate in that school's program, thereby developing an educational consortium for the postsecondary education of handicapped students. The Department believes that such a consortium, when developed and applied only to handicapped persons, would not constitute compliance with § 84.22, but would discriminate against qualified handicapped persons by restricting their choice in selecting institutions of higher education and would, therefore, be inconsistent with the basic objectives of the statute.

Nothing in this regulation, however, should be read as prohibiting institutions from forming consortia for the benefit of all students. Thus, if three colleges decide that it would be cost-efficient for one college to offer biology, the second physics, and the third chemistry to all students at the three colleges, the arrangement would not violate section 504. On the other hand, it would violate the regulation if the same institutions set up a consortium under which one college undertook to make its biology lab accessible, another its physics lab, and a third its chemistry lab, and under which mobility-impaired handicapped students (but not other students) were required to attend the particular college that is accessible for the desired courses.

Similarly, while a public school district need not make each of its buildings completely accessible, it may not make only one facility or part of a facility accessible if the result is to segregate handicapped students in a single setting.

All recipients that provide health, welfare, or other social services may also comply with § 84.22 by delivering services at alternate accessible sites or making home visits. Thus, for example, a pharmacist might arrange to make home deliveries of drugs. Under revised § 84.22(c), small providers of health, welfare, and social services (those with fewer than fifteen employees) may refer a beneficiary to an accessible provider of the desired service, but only if no means of meeting the program accessibility requirement other than a significant alteration in existing facilities is available. The referring recipient has the responsibility of determining that the other provider is in fact accessible and willing to provide the service. The Secretary believes this "last resort" referral provision is appropriate to avoid imposition of additional costs in the health care area, to encourage providers to remain in the Medicaid program, and to avoid imposing significant costs on small, low-budget providers such as day-care centers or foster homes.

A recent change in the tax law may assist some recipients in meeting their obligations under this section. Under section 2122 of the Tax Reform Act of 1976, recipients that pay federal income tax are eligible to claim a tax deduction of up to $25,000 for architectural and transportation modifications made to improve accessibility for handicapped persons. Many physicians and dentists, among others, may be eligible for this tax deduction. See 42 FR 17870 (April 4, 1977), adopting 26 CFR 7.190.

Several commenters expressed concern about the feasibility of compliance with the program accessibility standard. The Secretary believes that the standard is flexible enough to permit recipients to devise ways to make their programs accessible short of extremely expensive or impractical physical changes in facilities. Accordingly, the section does not allow for waivers. The Department is ready at all times to provide technical assistance to recipients in meeting their program accessibility responsibilities. For this purpose, the Department is establishing a special technical assistance unit. Recipients are encouraged to call upon the unit

staff for advice and guidance both on structural modifications and on other ways of meeting the program accessibility requirement.

Paragraph (d) has been amended to require recipients to make all nonstructural adjustments necessary for meeting the program accessibility standard within sixty days. Only where structural changes in facilities are necessary will a recipient be permitted up to three years to accomplish program accessibility. It should be emphasized that the three-year time period is not a waiting period and that all changes must be accomplished as expeditiously as possible. Further, it is the Department's belief, after consultation with experts in the field, that outside ramps to buildings can be constructed quickly and at relatively low cost. Therefore, it will be expected that such structural additions will be made promptly to comply with § 84.22(d).

The regulation continues to provide, as did the proposed version, that a recipient planning to achieve program accessibility by making structural changes must develop a transition plan for such changes within six months of the effective date of the regulation. A number of commenters suggested extending that period to one year. The Secretary believes that such an extension is unnecessary and unwise. Planning for any necessary structural changes should be undertaken promptly to ensure that they can be completed within the three-year period. The elements of the transition plan as required by the regulation remain virtually unchanged from the proposal but § 84.22(d) now includes a requirement that the recipient make the plan available for public inspection.

Several commenters expressed expressed concern that the program accessibility standard would result in the segregation of handicapped persons in educational institutions. The regulation will not be applied to permit such a result. See § 84.4(c)(2)(iv), prohibiting unnecessarily separate treatment; § 84.35, requiring that students in elementary and secondary schools be educated in the most integrated setting appropriate to their needs; and new § 84.43(d), applying the same standard to postsecondary education.

We have received some comments from organizations of handicapped persons on the subject of requiring, over an extended period of time, a barrier-free environment—that is, requiring the removal of all architectural barriers in existing facilities. The Department has considered these comments but has decided to take no further action at this time concerning these suggestions, believing that such action should only be considered in light of experience in implementing the program accessibility standard.

21. *New construction.* Section 84.23 requires that all new facilities, as well as alterations that could affect access to and use of existing facilities, be designed and constructed in a manner so as to make the facility accessible to and usable by handicapped persons. Section 84.23(a) has been amended so that it applies to each newly constructed facility if the construction was commenced after the effective date of the regulation. The words "if construction has commenced" will be considered to mean "if groundbreaking has taken place." Thus, a recipient will not be required to alter the design of a facility that has progressed beyond groundbreaking prior to the effective date of the regulation.

Paragraph (b) requires certain alterations to conform to the requirement of physical accessibility in paragraph (a). If an alteration is undertaken to a portion of a building the accessibility of which could be improved by the manner in which the alteration is carried out, the alteration must be made in that manner. Thus, if a doorway or wall is being altered, the door or other wall opening must be made wide enough to accommodate wheelchairs. On the other hand, if the alteration consists of altering ceilings, the provisions of this section are not applicable because this alteration cannot be done in a way that affects the accessibility of that portion of the building. The phrase "to the maximum extent feasible" has been added to allow for the occasional case in which the nature of an existing facility is such as to make it impractical or prohibitively expensive to renovate the building in a manner that results in its being entirely barrier-free. In all such cases, however, the alteration should provide the maximum amount of physical accessibility feasible.

As proposed, § 84.23(c) required compliance with the American National Standards Institute (ANSI) standard on building accessibility as the minimum necessary for compliance with the accessibility requirement of §§ 84.23 (a) and (b). The reference to the ANSI standard created some ambiguity, since the standard itself provides for waivers where other methods are equally effective in providing accessibility to the facility. Moreover, the Secretary does not wish to discourage innovation in barrier-free construction by requiring absolute adherence to a rigid design standard. Accordingly, § 84.23 (c) has been revised to permit departures from particular requirements of the ANSI standard where the recipient can demonstrate that equivalent access to the facility is provided.

Section 84.23(d) of the proposed regulation, providing for a limited deferral of action concerning facilities that are subject to section 502 as well as section 504 of the Act, has been deleted. The Secretary believes that the provision is unnecessary and inappropriate to this regulation. The Department will, however, seek to coordinate enforcement activities under this regulation with those of the Architectural and Transportation Barriers Compliance Board.

Subpart D—Preschool, Elementary, and Secondary Education

Subpart D sets forth requirements for nondiscrimination in preschool, elementary, secondary, and adult education programs and activities, including secondary vocational education programs. In this context, the term "adult education" refers only to those educational programs and activities for adults that are operated by elementary and secondary schools.

The provisions of Subpart D apply to state and local educational agencies. Although the subpart applies, in general, to both public and private education programs and activities that are federally assisted, §§ 84.32 and 84.33 apply only to public programs and § 84.39 applies only to private programs; §§ 84.35 and 84.36 apply both to public programs and to those private programs that include special services for handicapped students.

Subpart B generally conforms to the standards established for the education of handicapped persons in *Mills* v. *Board of Education of the District of Columbia*, 348 F. Supp. 866 (D.D.C. 1972), *Pennsylvania Association for Retarded Children* v. *Commonwealth of Pennsylvania*, 334 F. Supp. 1257 (E.D. 1971), 343 F. Supp. 279 (E.D.Pa. 1972), and *Lebanks* v. *Spears*, 60, F.R.D. 135 (E.D. La. 1973), as well as in the Education of the Handicapped Act, as amended by Public Law 94–142 (the EHA).

The basic requirements common to those cases, to the EHA, and to this regulation are (1) that handicapped persons, regardless of the nature or severity of their handicap, be provided a free appropriate public education, (2) that handicapped students be educated with nonhandicapped students to the maximum extent appropriate to their needs, (3) that educational agencies undertake to identify and locate all unserved handicapped children, (4) that evaluation procedures be improved in order to avoid the inappropriate education that results from the misclassification of students, and (5) that procedural safeguard be established to enable parents and guardians to influence decisions regarding the evaluation and placement of their children. These requirements are designed to ensure that no handicapped child is excluded from school on the basis of handicap and, if a recipient demonstrates that placement in a regular educational setting cannot be achieved satisfactorily, that the student is provided with adequate alternative services suited to the student's needs without additional cost to the student's parents or guardian. Thus, a recipient that operates a public school system must either educate handicapped children in its regular program or provide such children with an appropriate alternative education at public expense.

It is not the intention of the Department, except in extraordinary circumstances, to review the result of individual placement and other educational decisions, so long as the school district complies with the "process" requirements of this subpart (concerning identification and location, evaluation, and due process procedures). However, the Department will place a high priority on investigating cases which may involve exclusion of a child from the education system or a pattern or practice of discriminatory placements or education.

22. *Location and notification.* Section 84.32 requires public schools to take steps annually to identify and locate handicapped children who are not receiving an education and to publicize to handicapped children and their parents the rights and duties established by section 504 and this regulation. This section has been shortened without substantive change.

23. *Free appropriate public education.* Former §§ 84.34 ("Free education") and 84.36(a) ("Suitable education") have been consolidated and revised in new § 84.33. Under § 84.34(a), a recipient is responsible for providing a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction. The word "in" encompasses the concepts of both domicile and actual residence. If a recipient places a child in a program other than its own, it remains financially responsible for the child, whether or not the other program is operated by another recipient or educational agency. Moreover, a recipient may not place a child in a program that is inappropriate or that otherwise violates the requirements of Subpart D. And in no case may a recipient refuse to provide services to a handicapped child in its jurisdiction because of another person's or entity's failure to assume financial responsibility.

Section 84.33(b) concerns the provision of appropriate educational services to handicapped children. To be appropriate, such services must be designed to meet handicapped children's individual educational needs to the same extent that those of nonhandicapped children are met. An appropriate education could consist of education in regular classes, education in regular classes with the use of supplementary services, or special education and related services. Special education may include specially designed instruction in classrooms, at home, or in private or public institutions and may be accompanied by such related services as developmental, corrective, and other supportive services (including psychological, counseling, and medical diagnostic services). The placement of the child must however, be con-

sistent with the requirements of § 84.34 and be suited to his or her educational needs.

The quality of the educational services provided to handicapped students must equal that of the services provided to nonhandicapped students; thus, handicapped student's teachers must be trained in the instruction of persons with the handicap in question and appropriate materials and equipment must be available. The Department is aware that the supply of adequately trained teachers may, at least at the outset of the imposition of this requirement, be insufficient to meet the demand of all recipients. This factor will be considered in determining the appropriateness of the remedy for noncompliance with this section. A new § 84.33(b)(2) has been added, which allows this requirements to be met through the full implementation of an individualized education program developed in accordance with the standards of the EHA.

Paragraph (c) of § 84.33 sets forth the specific financial obligations of a recipient. If a recipient does not itself provide handicapped persons with the requisite services, it must assume the cost of any alternate placement. If, however, a recipient offers adequate services and if alternate placement is chosen by a student's parent or guardian, the recipient need not assume the cost of the outside services. (If the parent or guardian believes that his or her child cannot be suitably educated in the recipient's program, he or she may make use of the procedures established in § 84.36.) Under this paragraph, a recipient's obligation extends beyond the provision of tuition payments in the case of placement outside the regular program. Adequate transportation must also be provided. Recipients must also pay for psychological services and those medical services necessary for diagnostic and evaluative purposes.

If the recipient places a student, because of his or her handicap, in a program that necessitates his or her being away from home, the payments must also cover room and board and nonmedical care (including custodial and supervisory care). When residential care is necessitated not by the student's handicap but by factors such as the student's home conditions, the recipient is not required to pay the cost of room and board.

Two new sentences have been added to paragraph (c)(1) to make clear that a recipient's financial obligations need not be met solely through its own funds. Recipients may rely on funds from any public or private source including insurers and similar third parties.

The EHA requires a free appropriate education to be provided to handicapped children "no later than September 1, 1978," but section 504 contains no authority for delaying enforcement. To resolve this problem, a new paragraph (d) has been added to § 84.33. Section 84.33(d) requires recipients to achieve full compliance with the free appropriate public education requirements of § 84.33 as expeditiously as possible, but in no event later than September 1, 1978. The provision also makes clear that, as of the effective date of this regulation, no recipient may exclude a qualified handicapped child from its educational program. This provision against exclusion is consistent with the order of providing services set forth in section 612(3) of the EHA, which places the highest priority on providing services to handicapped children who are not receiving an education.

24. *Educational setting.* Section 84.34 prescribes standards for educating handicapped persons with nonhandicapped persons to the maximum extent appropriate to the needs of the handicapped person in question. A handicapped student may be removed from the regular educational setting only where the recipient can show that the needs of the student would, on balance, be served by placement in another setting.

Although under § 84.34, the needs of the handicapped person are determinative as to proper placement, it should be stressed that, where a handicapped student is so disruptive in a regular classroom that the education of other students is significantly impaired, the needs of the handicapped child cannot be met in that environment. Therefore, regular placement would not be appropriate to his or her needs and would not be required by § 84.34.

Among the factors to be considered in placing a child is the need to place the child as close to home as possible. A new sentence has been added to paragraph (a) requiring recipients to take this factor into account. As pointed out in several comments, the parents' right under § 84.36 to challenge the placement of their child extends not only to placement in special classes or separate schools but also to placement in a distant school and, in particular, to residential placement. An equally appropriate educational program may exist closer to home; this issue may be raised by the parent or guardian under §§ 84.34 and 84.36.

New paragraph (b) specifies that handicapped children must also be provided nonacademic services in as integrated a setting as possible. This requirement is especially important for children whose educational needs necessitate their being solely with other handicapped children during most of each day. To the maximum extent appropriate, children in residential settings are also to be provided opportunities for participation with other children.

Section 84.34(c) (formerly § 84.38) requires that any facilities that are identifiable as being for handicapped students be comparable in quality to other facilities of the recipient. A number of comments objected to this section on the basis that it encourages the creation and maintenance of such facilities. This is not the intent of the provision. A separate facility violates section 504 unless it is indeed necessary to the provision of an appropriate education to certain handicapped students. In those instances in which such facilities are necessary (as might be the case, for example, for severely retarded persons), this provision requires that the educational services provided be comparable to those provided in the facilities of the recipient that are not identifiable as being for handicapped persons.

25. *Evaluation and placement.* Because the failure to provide handicapped persons with an appropriate education is so frequently the result of misclassification or misplacement, section 84.33(b)(1) makes compliance with its provisions contingent upon adherence to certain procedures designed to ensure appropriate classification and placement. These procedures, delineated in §§ 84.35 and 84.36, are concerned with testing and other evaluation methods and with procedural due process rights.

Section 84.35(a) requires that an individual evaluation be conducted before any action is taken with respect either to the initial placement of a handicapped child in a regular or special education program or to any subsequent significant change in that placement. Thus, a full reevaluation is not required every time an adjustment in placement is made. "Any action" includes denials of placement.

Paragraphs (b) and (c) of § 84.35 establishes procedures designed to ensure that children are not misclassified, unnecessarily labeled as being handicapped, or incorrectly placed because of inappropriate selection, administration, or interpretation of evaluation materials. This problem has been extensively documented in "Issues in the Classification of Children," a report by the Project on Classification of Exceptional Children, in which the HEW Interagency Task Force participated. The provisions of these paragraphs are aimed primarily at abuses in the placement process that result from misuse of, or undue or misplaced reliance on, standardized scholastic aptitude tests.

Paragraph (b) has been shortened but not substantively changed. The requirement in former subparagraph (1) that recipients provide and administer evaluation materials in the native language of the student has been deleted as unnecessary, since the same requirement already exists under title VI and is more appropriately covered under that statute. Subparagraphs (1) and (2) are, in general, intended to prevent misinterpretation and similar misuse of test scores and, in particular, to avoid undue reliance on general intelligence tests. Subparagraph (3) requires a recipient to administer tests to a student with impaired sensory, manual, or speaking skills in whatever manner is necessary to avoid distortion of the test results by the impairment. Former subparagraph (4) has been deleted as unnecessarily repetitive of the other provisions of this paragraph.

Paragraph (c) requires a recipient to draw upon a variety of sources in the evaluation process so that the possibility of error in classification is minimized. In particular, it requires that all significant factors relating to the learning process, including adaptive behavior, be considered. (Adaptive behavior is the effectiveness with which the individual meets the standards of personal independence and social responsibility expected of his or her age and cultural group.) Information from all sources must be documented and considered by a group of persons, and the procedure must ensure that the child is placed in the most integrated setting appropriate.

The proposed regulation would have required a complete individual reevaluation of the student each year. The Department has concluded that it is inappropriate in the section 504 regulation to require full reevaluations on such a rigid schedule. Accordingly, § 84.35(c) requires periodic reevaluations and specifies that reevaluations in accordance with the EHA will constitute compliance. The proposed regulation implementing the EHA allows reevaluation at three-year intervals except under certain specified circumstances.

Under § 84.36, a recipient must establish a system of due process procedures to be afforded to parents or guardians before the recipient takes any action regarding the identification, evaluation, or educational placement of a person who, because of handicap, needs or is believed to need special education or related services. This section has been revised. Because the due process procedures of the EHA, incorporated by reference in the proposed section 504 regulation, are inappropriate for some recipients not subject to that Act, the section now specifies minimum necessary procedures: notice, a right to inspect records, an impartial hearing with a right to representation by counsel, and a review procedure. The EHA procedures remain one means of meeting the regulation's due process requirements, however, and are recommended to recipients as a model.

26. *Nonacademic services.* Section 84.37 requires a recipient to provide nonacademic and extracurricular services and activities in such manner as is necessary to afford handicapped students an equal opportunity for participation. Because these services and activities are part of a recipient's education program, they must, in accordance with the

provisions of § 84.34, be provided in the most integrated setting appropriate.

Revised paragraph (c)(2) does permit separation or differentiation with respect to the provision of physical education and athletics activities, but only if qualified handicapped students are also allowed the opportunity to compete for regular teams or participate in regular activities. Most handicapped students are able to participate in one or more regular physical education and athletics activities. For example, a student in a wheelchair can participate in regular archery course, as can a deaf student in a wrestling course.

Finally, the one-year transition period provided in former § 84.37(a)(3) was deleted in response to the almost unanimous objection of commenters to that provision.

27. *Preschool and adult education.* Section 84.38 prohibits discrimination on the basis of handicap in preschool and adult education programs. Former paragraph (b), which emphasized that compensatory programs for disadvantaged children are subject to section 504, has been deleted as unnecessary, since it is comprehended by paragraph (a).

28. *Private education.* Section 84.39 sets forth the requirements applicable to recipients that operate private education programs and activities. The obligations of these recipients have been changed in two significant respects: first, private schools are subject to the evaluation and due process provisions of the subpart only if they operate special education programs; second, under § 84.39(b), they may charge more for providing services to handicapped students than to nonhandicapped students to the extent that additional charges can be justified by increased costs.

Paragraph (a) of § 84.39 is intended to make clear that recipients that operate private education programs and activities are not required to provide an appropriate education to handicapped students with special educational needs if the recipient does not offer programs designed to meet those needs. Thus, a private school that has no program for mentally retarded persons is neither required to admit such a person into its program nor to arrange or pay for the provision of the person's education in another program. A private recipient without a special program for blind students, however, would not be permitted to exclude, on the basis of blindness, a blind applicant who is able to participate in the regular program with minor adjustments in the manner in which the program is normally offered.

SUBPART E—POSTSECONDARY EDUCATION

Subpart E prescribes requirements for nondiscrimination in recruitment, admission, and treatment of students in postsecondary education programs and activities, including vocational education.

29. *Admission and recruitment.* In addition to a general prohibition of discrimination on the basis of handicap in § 84.42(a), the regulation delineates, in § 84.42(b), specific prohibitions concerning the establishment of limitations on admission of handicapped students, the use of tests or selection criteria, and preadmission inquiry. Several changes have been made in this provision.

Section 84.42(b) provides that postsecondary educational institutions may not use any test or criterion for admission that has a disproportionate, adverse effect on handicapped persons unless it has been validated as a predictor of academic success and alternate tests or criteria with a less disproportionate, adverse effect are shown by the Department to be available. There are two significant changes in this approach from the July 16 proposed regulation.

First, many commenters expressed concern that § 84.42(b)(2)(ii) could be interpreted to require a "global search" for alternate tests that do not have a disproportionate, adverse impact on handicapped persons. This was not the intent of the provision, and, therefore, it has been amended to place the burden on the Director of the Office for Civil Rights, rather than on the recipient, to identify alternate tests.

Second, a new paragraph (d), concerning validity studies, has been added. Under the proposed regulation, overall success in an education program, not just first-year grades, was the criterion against which admissions tests were to be validated. This approach has been changed to reflect the comment of professional testing services that use of first-year grades would be less disruptive of present practice and that periodic validity studies against overall success in the education program would be sufficient check on the reliability of first-year grades.

Section 84.42(b)(3) also requires a recipient to assure itself that admissions tests are selected and administered to applicants with impaired sensory, manual, or speaking skills in such manner as is necessary to avoid unfair distortion of test results. Methods have been developed for testing the aptitude and achievement of persons who are not able to take written tests or even to make the marks required for mechanically scored objective tests; in addition, methods for testing persons with visual or hearing impairments are available. A recipient, under this paragraph, must assure itself that such methods are used with respect to the selection and administration of any admissions tests that it uses.

Section 84.42(b)(3)(iii) has been amended to require that admissions tests be administered in facilities that, on the whole, are accessible. In this context, "on the whole" means that not all of the facilities need be accessible so long as a sufficient number of facilities are available to handicapped persons.

Revised § 84.42(b)(4) generally prohibits preadmission inquiries as to whether an applicant has a handicap. The considerations that led to this revision are similar to those underlying the comparable revision of § 84.14 on preemployment inquiries. The regulation does, however, allow inquiries to be made, after admission but before enrollment, as to handicaps that may require accommodation.

New paragraph (c) parallels the section on preemployment inquiries and allows postsecondary institutions to inquire about applicants' handicaps before admission, subject to certain safeguards, if the purpose of the inquiry is to take remedial action to correct past discrimination or to take voluntary action to overcome the limited participation of handicapped persons in postsecondary educational institutions.

Proposed § 84.42(c), which would have allowed different admissions criteria in certain cases for handicapped persons, was widely misinterpreted in comments from both handicapped persons and recipients. We have concluded that the section is unnecessary, and it has been deleted.

30. *Treatment of students.* Section 84.43 contains general provisions prohibiting the discriminatory treatment of qualified handicapped applicants. Paragraph (b) requires recipients to ensure that equal opportunities are provided to its handicapped students in education programs and activities that are not operated by the recipient. The recipient must be satisfied that the outside education program or activity as a whole is nondiscriminatory. For example, a college must ensure that discrimination on the basis of handicap does not occur in connection with teaching assignments of student teachers in elementary or secondary schools not operated by the college. Under the "as a whole" wording, the college could continue to use elementary or secondary school systems that discriminate if, and only if, the college's student teaching program, when viewed in its entirety, offered handicapped student teachers the same range and quality of choice in student teaching assignments afforded nonhandicapped students.

Paragraph (c) of this section prohibits a recipient from excluding qualified handicapped students from any course, course of study, or other part of its education program or activity. This paragraph is designed to eliminate the practice of excluding handicapped persons from specific courses and from areas of concentration because of factors such as ambulatory difficulties of the student or assumptions by the recipient that no job would be available in the area in question for a person with that handicap.

New paragraph (d) requires postsecondary institutions to operate their programs and activities so that handicapped students are provided services in the most integrated setting appropriate. Thus, if a college had several elementary physics classes and had moved one such class to the first floor of the science building to accommodate students in wheelchairs, it would be a violation of this paragraph for the college to concentrate handicapped students with no mobility impairments in the same class.

31. *Academic adjustments.* Paragraph (a) of § 84.44 requires that a recipient make certain adjustments to academic requirements and practices that discriminate or have the effect of discriminating on the basis of handicap. This requirement, like its predecessor in the proposed regulation, does not obligate an institution to waive course or other academic requirements. But such institutions must accommodate those requirements to the needs of individual handicapped students. For example, an institution might permit an otherwise qualified handicapped student who is deaf to substitute an art appreciation or music history course for a required course in music appreciation or could modify the manner in which the music appreciation course is conducted for the deaf student. It should be stressed that academic requirements that can be demonstrated by the recipient to be essential to its program of instruction or to particular degrees need not be changed.

Paragraph (b) provides that postsecondary institutions may not impose rules that have the effect of limiting the participation of handicapped students in the education program. Such rules include prohibition of tape recorders or brailliers in classrooms and dog guides in campus buildings. Several recipients expressed concern about allowing students to tape record lectures because the professor may later want to copyright the lectures. This problem may be solved by requiring students to sign agreements that they will not release the tape recording or transcription or otherwise hinder the professor's ability to obtain a copyright.

Paragraph (c) of this section, concerning the administration of course examinations to students with impaired sensory, manual, or speaking skills, parallels the regulation's provisions on admissions testing (§ 84.42(b)) and will be similarly interpreted.

Under § 84.44(d), a recipient must ensure that no handicapped student is subject to discrimination in the recipient's program because of the absence of necessary auxiliary educational aids. Colleges and universities expressed concern about the costs of compliance with this provision.

The Department emphasizes that recipients can usually meet this obligation by assisting students in using existing resources for auxiliary aids such as state vocational re-

habilitation agencies and private charitable organizations. Indeed, the Department anticipates that the bulk of auxiliary aids will be paid for by state and private agencies, not by colleges or universities. In those circumstances where the recipient institution must provide the educational auxiliary aid, the institution has flexibility in choosing the methods by which the aids will be supplied. For example, some universities have used students to work with the institution's handicapped students. Other institutions have used existing private agencies that tape texts for handicapped students free of charge in order to reduce the number of readers needed for visually impaired students.

As long as no handicapped person is excluded from a program because of the lack of an appropriate aid, the recipient need not have all such aids on hand at all times. Thus, readers need not be available in the recipient's library at all times so long as the schedule of times when a reader is available is established, is adhered to, and is sufficient. Of course, recipients are not required to maintain a complete braille library.

32. *Housing.* Section 84.45(a) requires postsecondary institutions to provide housing to handicapped students at the same cost as they provide it to other students and in a convenient, accessible, and comparable manner. Commenters, particularly blind persons, pointed out that some handicapped persons can live in [illegible] college housing and need not wait to the end of the transition period in Subpart C to be offered the same variety and scope of housing accommodations given to nonhandicapped persons. The Department concurs with this position and will interpret this section accordingly.

A number of colleges and universities reacted negatively to paragraph (b) of this section. It provides that, if a recipient assists in making off-campus housing available to its students, it should develop and implement procedures to assure itself that off-campus housing, as a whole, is available to handicapped students. Since postsecondary institutions are presently required to assure themselves that off-campus housing is provided in a manner that does not discriminate on the basis of sex (§ 86.32 of the title IX regulation), they may use the procedures developed under title IX in order to comply with § 84.45(b). It should be emphasized that not every off-campus living accommodation need be made accessible to handicapped persons.

33. *Health and insurance.* Section 84.46 of the proposed regulation, providing that recipients may not discriminate on the basis of handicap in the provision of health and related services, has been deleted as duplicative of the general provisions of section 84.43. This deletion represents no change in the obligation of recipients to provide nondiscriminatory health and insurance plans. The Department will continue to require that nondiscriminatory health services be provided to handicapped students. Recipients are not required, however, to provide specialized services and aids to handicapped persons in health programs. If, for example, a college infirmary treats only simple disorders such as cuts, bruises, and colds, its obligation to handicapped persons is to treat such disorders for them.

34. *Financial assistance.* Section 84.46(a) (formerly § 84.47), prohibiting discrimination in providing financial assistance, remains substantively the same. It provides that recipients may not provide less assistance to or limit the eligibility of qualified handicapped persons for such assistance, whether the assistance is provided directly by the recipient or by another entity through the recipient's sponsorship. Awards that are made under wills, trusts, or similar legal instruments in a discriminatory manner are permissible, but only if the overall effect of the recipient's provision of financial assistance is not discriminatory on the basis of handicap.

It will not be considered discriminatory to deny, on the basis of handicap, an athletic scholarship to a handicapped person if the handicap renders the person unable to qualify for the award. For example, a student who has a neurological disorder might be denied a varsity football scholarship on the basis of his inability to play football, but a deaf person could not, on the basis of handicap, be denied a scholarship for the school's diving team. The deaf person could, however, be denied a scholarship on the basis of comparative diving ability.

Commenters on § 84.46(b), which applies to assistance in obtaining outside employment for students, expressed similar concerns to those raised under § 84.43(b), concerning cooperative programs. This paragraph has been changed in the same manner as § 84.43(b) to include the "as a whole" concept and will be interpreted in the same manner as § 84.43(b).

35. *Nonacademic services.* Section 84.47 (formerly § 84.48) establishes nondiscrimination standards for physical education and athletics counseling and placement services, and social organizations. This section sets the same standards as does § 84.38 of Subpart D, discussed above, and will be interpreted in a similar fashion.

Subpart F—Health, Welfare, and Social Services

Subpart F applies to recipients that operate health, welfare, and social service programs. The Department received fewer comments on this subpart than on others.

Although many commented that Subpart F lacked specificity, these commenters provided neither concrete suggestions nor additions. Nevertheless, some changes have been made, pursuant to comment, to clarify the obligations of recipients in specific areas. In addition, in an effort to reduce duplication in the regulation, the section governing recipients providing health services (proposed § 84.52) has been consolidated with the section regulating providers of welfare and social services (proposed §84.53). Since the separate provisions that appeared in the proposed regulation were almost identical, no substantive change should be inferred from their consolidation.

Several commenters asked whether Subpart F applies to vocational rehabilitation agencies whose purpose is to assist in the rehabilitation of handicapped persons. To the extent that such agencies receive financial assistance from the Department, they are covered by Subpart F and all other relevant subparts of the regulation. Nothing in this regulation, however, precludes such agencies from servicing only handicapped persons. Indeed, § 84.4(c) permits recipients to offer services or benefits that are limited by federal law to handicapped persons or classes of handicapped persons.

Many comments suggested requiring state health, welfare, and social service agencies to take an active role in the enforcement of section 504 with regard to local health and social service providers. The Department believes that the possibility for federal-state cooperation in the administration and enforcement of section 504 warrants further consideration. Moreover, the Department will rely largely on state Medicaid agencies, as it has under title VI, for monitoring compliance by individual Medicaid providers.

A number of comments also discussed whether section 504 should be read to require payment of compensation to institutionalized handicapped patients who perform services for the institution in which they reside. The Department of Labor has recently issued a proposed regulation under the Fair Labor Standards Act (FLSA) that covers the question of compensation for institutionalized persons. 42 FR 15224 (March 18, 1977). This Department will seek information and comment from the Department of Labor concerning that agency's experience administering the FLSA regulation.

36. *Health, welfare, and other social service providers.* As already noted, § 84.53 has been combined with proposed § 84.53 into a single section covering health, welfare, and other social services. Section 84.52(a) has been expanded in several respects. The addition of new paragraph (a)(2) is intended to make clear the basic requirement of equal opportunity to receive benefits or services in the health, welfare, and social service areas. The paragraph parallels §§ 84.4 (b)(ii) and 84.43(b). New paragraph (a)(3) requires the provision of effective benefits or services, as defined in § 84.4(b)(2) (i.e., benefits or services which "afford handicapped persons equal opportunity to obtain the same result (or) to gain the same benefit * * *").

Section 84.52(a) also includes provisions concerning the limitation of benefits or services to handicapped persons and the subjection of handicapped persons to different eligibility standards. (These provisions were previously included in the welfare recipient section (§ 84.53(a)).) One common misconception about the regulation is that it would require specialized hospitals and other health care providers to treat all handicapped persons. The regulation makes no such requirement. Thus, a burn treatment center need not provide other types of medical treatment to handicapped persons unless it provides such medical services to nonhandicapped persons. It could not, however, refuse to treat the burns of a deaf person because of his or her deafness.

Commenters had raised the question of whether the prohibition against different standards of eligibility might preclude recipients from providing special services to handicapped persons or classes of handicapped persons. The regulation will not be so interpreted, and the specific section in question has been eliminated. Section 84.4(c) makes clear that special programs for handicapped persons are permitted.

A new paragraph (a)(5) concerning the provision of different or separate services or benefits has been added. This provision prohibits such treatment unless necessary to provide qualified handicapped persons with benefits and services that are as effective as those provided to others.

Section 84.52(a)(2) of the proposed regulation has been omitted as duplicative of revised § 84.22 (b) and (c) in Subpart C. As discussed above, these sections permit health care providers to arrange to meet patients in accessible facilities and to make referrals in carefully limited circumstances.

Section 84.52(a)(3) of the proposed regulation has been redesignated § 84.52(b) and has been amended to cover written material concerning waivers of rights or consent to treatment as well as general notices concerning health benefits or services. The section requires the recipient to ensure that qualified handicapped persons are not denied effective notice because of their handicap. For Example, recipients could use several different types of notice in order to reach persons with impaired vision or hearing, such as brailled messages, radio spots, and tactile devices on cards or envelopes to inform blind persons of the need to call the recipient for further information.

Sections 84.52(a)(4), 84.52(a)(5), and 84.52(b) have been omitted from the regula-

tion as unnecessary. They are clearly comprehended by the more general sections banning discrimination.

Section 84.52(c) is a new section requiring recipient hospitals to establish a procedure for effective communication with persons with impaired hearing for the purpose of providing emergency health care. Although it would be appropriate for a hospital to fulfill its responsibilities under this section by having a full-time interpreter for the deaf on staff, there may be other means of accomplishing the desired result of assuring that some means of communication is immediately available for deaf persons needing emergency treatment.

Section 84.52(d), also a new provision, requires recipients with fifteen or more employees to provide appropriate auxiliary aids for persons with impaired sensory, manual, or speaking skills. Further, the Director may require a small provider to furnish auxiliary aids where the provision of aids would not adversely affect the ability of the recipient to provide its health benefits or services. Thus, although a small nonprofit neighborhood clinic might not be obligated to have available an interpreter for deaf persons, the Director may require provision of such aids as may be reasonably available to ensure that qualified handicapped persons are not denied appropriate benefits or services because of their handicaps.

37. *Treatment of Drug Addicts and Alcoholics.* Section 84.53 is a new section that prohibits discrimination in the treatment and admission of drug and alcohol addicts to hospitals and outpatient facilities. This section is included pursuant to section 407, Public Law 92-255, the Drug Abuse Office and Treatment Act of 1972 (21 U.S.C. 1174), as amended, and section 321, Public Law 91-616, the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act of 1970 (42 U.S.C. 4581), as amended, and section 321, Public Law 93-282. Section 504 itself also prohibits such discriminatory treatment and, in addition, prohibits similar discriminatory treatment by other types of health providers. Section 84.53 prohibits discrimination against drug abusers by operators of outpatient facilities, despite the fact that section 407 pertains only to hospitals, because of the broader application of section 504. This provision does not mean that all hospitals and outpatient facilities must treat drug addiction and alcoholism. It simply means, for example, that a cancer clinic may not refuse to treat cancer patients simply because they are also alcoholics.

38. *Education of institutionalized persons.* The regulation retains § 84.54 of the proposed regulation that requires that an appropriate education be provided to qualified handicapped persons who are confined to residential institutions or day care centers.

Subpart G—Procedures

In § 84.61, the Secretary has adopted the title VI complaint and enforcement procedures for use in implementing section 504 until such time as they are superseded by the issuance of a consolidated procedural regulation applicable to all of the civil rights statutes and executive orders administered by the Department.

Appendix B—Enforcement Procedures

Sections 80.6–80.10 and Part 81 of Title 45 of the Code of Federal Regulations are reprinted here without change for the convenience of the reader:

§ 80.6 Compliance information.

(a) *Cooperation and assistance.* The responsible Department official shall to the fullest extent practicable seek the cooperation of recipients in obtaining compliance with this part and shall provide assistance and guidance to recipients to help them comply voluntarily with this part.

(b) *Compliance reports.* Each recipient shall keep such records and submit to the responsible Department official or his designee timely, complete and accurate compliance reports at such times, and in such form and containing such information, as the responsible Department official or his designee may determine to be necessary to enable him to ascertain whether the recipient has complied or is complying with this part. For example, recipients should have available for the Department racial and ethnic data showing the extent to which members of minority groups are beneficiaries of and participants in federally-assisted programs. In the case of any program under which a primary recipient extends Federal financial assistance to any other recipient, such other recipient shall also submit such compliance reports to the primary recipient as may be necessary to enable the primary recipient to carry out its obligations under this part.

(c) *Access to sources of information.* Each recipient shall permit access by the responsible Department official or his designee during normal business hours to such of its books, records, accounts, and other sources of information, and its facilities as may be pertinent to ascertain compliance with this part. Where any information required of a recipient is in the exclusive possession of any other agency, institution or person and this agency, institution or person shall fail or refuse to furnish this information the recipient shall so certify in its report and shall set forth what efforts it has made to obtain the information. Asserted considerations of privacy or confidentiality may not operate to bar the Department from evaluating or seeking to enforce compliance with this Part. Information of a confidential nature obtained in connection with compliance evaluation or enforcement shall not be disclosed except where necessary in formal enforcement proceedings or where otherwise required by law.

(d) *Information to beneficiaries and participants.* Each recipient shall make available to participants, beneficiaries, and other interested persons such information regarding the provisions of this regulation and its applicability to the program for which the recipient receives Federal financial assistance, and make such information available to them in such manner, as the responsible Department official finds necessary to apprise such persons of the protections against discrimination assured them by the Act and this regulation.

(Sec. 601, 602, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d, 2000d–1) [29 FR 16298, Dec. 4, 1964, as amended at 32 FR 14555, Oct. 19, 1967; 38 FR 17981, 17983, July 5, 1973]

§ 80.7 Conduct of investigations.

(a) *Periodic compliance reviews.* The responsible Department official or his designee shall from time to time review the practices of recipients to determine whether they are complying with this part.

(b) *Complaints.* Any person who believes himself or any specific class of individuals to be subjected to discrimination prohibited by this part may by himself or by a representative file with the responsible Department official or his designee a written complaint. A complaint must be filed not later than 180 days from the date of the alleged discrimination, unless the time for filing is extended by the responsible Department official or his designee.

(c) *Investigations.* The responsible Department official or his designee will make a prompt investigation whenever a compliance review, report, complaint, or any other information indicates a possible failure to comply with this part. The investigation should include, where appropriate, a review of the pertinent practices and policies of the recipient, the circumstances under which the possible noncompliance with this part occurred, and other factors relevant to a determination as to whether the recipient has failed to comply with this part.

(d) *Resolution of matters.* (1) If an investigation pursuant to paragraph (c) of this section indicates a failure to comply with this part, the responsible Department official or his designee will so inform the recipient and the matter will be resolved by informal means whenever possible. If it has been determined that the matter cannot be resolved by informal means, action will be taken as provided for in § 80.8.

(2) If an investigation does not warrant action pursuant to subparagraph (1) of this paragraph the responsible Department official or his designee will so inform the recipient and the complainant, if any, in writing.

(e) *Intimidatory or retaliatory acts prohibited.* No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by section 601 of the Act or this part, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this part. The identity of complainants shall be kept confidential except to the extent necessary to carry out the purposes of this part, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder.

(Sec. 601, 602, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d, 2000d–1) [29 FR 16298, Dec. 4, 1964, as amended at 38 FR 17981, 17983, July 5, 1973]

§ 80.8 Procedure for effecting compliance.

(a) *General.* If there appears to be a failure or threatened failure to comply with this regulation, and if the noncompliance or threatened noncompliance cannot be corrected by informal means, compliance with this part may be effected by the suspension or termination of or refusal to grant or to continue Federal financial assistance or by any other means authorized by law. Such other means may include, but are not limited to, (1) a reference to the Department of Justice with a recommendation that appropriate proceedings be brought to enforce any rights of the United States under any law of the United States (including other titles of the Act), or any assurance or other contractual undertaking, and (2) any applicable proceeding under State or local law.

(b) *Noncompliance with § 80.4.* If an applicant fails or refuses to furnish an assurance required under § 80.4 or otherwise fails or refuses to comply with a requirement imposed by or pursuant to that section Federal financial assistance may be refused in accordance with the procedures of paragraph (c) of this section. The Department shall not be required to provide assistance in such a case during the pendency of the administrative proceedings under such paragraph except that the Department shall continue assistance during the pendency of such proceedings where such assistance is due and payable pursuant to an application therefor approved prior to the effective date of this part.

(c) *Termination of or refusal to grant or to continue Federal financial assistance.* No order suspending, terminating or refusing to grant or continue Federal financial assistance shall become effective until (1) the responsible Department official has advised the applicant or recipient of his failure to comply and has determined that compliance cannot be secured by voluntary means, (2) there has been an express finding on the record, after opportunity for hearing, of a failure by the applicant or recipient to comply with a requirement imposed by or pursuant to this part, (3) the expiration of 30 days after the Secretary has filed with the committee of the House and the committee of the Senate having legislative jurisdiction over the program involved, a full written report of the circumstances and the grounds for such action. Any action to suspend or terminate or to refuse to grant or to continue Federal financial assistance shall be limited to the particular political entity, or part thereof, or other applicant or recipient as to whom such a finding has been made and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found.

(d) *Other means authorized by law.* No action to effect compliance by any other means authorized by law shall be taken until (1) the responsible De-

partment official has determined that compliance cannot be secured by voluntary means, (2) the recipient or other person has been notified of its failure to comply and of the action to be taken to effect compliance, and (3) the expiration of at least 10 days from the mailing of such notice to the recipient or other person. During this period of at least 10 days additional efforts shall be made to persuade the recipient or other person to comply with the regulation and to take such corrective action as may be appropriate.

(Sec. 601, 602, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d, 2000d-1. Sec. 182, 80 Stat. 1209; 42 U.S.C. 2000d-5) [29 FR 16298, Dec. 4, 1964, as amended at 32 FR 14556, Oct. 19, 1967; 38 FR 17982, July 5, 1973]

§ 80.9 Hearings.

(a) *Opportunity for hearing.* Whenever an opportunity for a hearing is required by § 80.8(c), reasonable notice shall be given by registered or certified mail, return receipt requested, to the affected applicant or recipient. This notice shall advise the applicant or recipient of the action proposed to be taken, the specific provision under which the proposed action against it is to be taken, and the matters of fact or law asserted as the basis for this action, and either (1) fix a date not less than 20 days after the date of such notice within which the applicant or recipient may request of the responsible Department official that the matter be scheduled for hearing or (2) advise the applicant or recipient that the matter in question has been set down for hearing at a stated place and time. The time and place so fixed shall be reasonable and shall be subject to change for cause. The complainant, if any, shall be advised of the time and place of the hearing. An applicant or recipient may waive a hearing and submit written information and argument for the record. The failure of an applicant or recipient to request a hearing for which a date has been set shall be deemed to be a waiver of the right to a hearing under section 602 of the Act and § 80.8(c) of this regulation and consent to the making of a decision on the basis of such information as may be filed as the record.

(b) *Time and place of hearing.* Hearings shall be held at the offices of the Department in Washington, D.C., at a time fixed by the responsible Department official unless he determines that the convenience of the applicant or recipient or of the Department requires that another place be selected. Hearings shall be held before a hearing examiner designated in accordance with 5 U.S.C. 3105 and 3344 (section 11 of the Administrative Procedure Act).

(c) *Right to counsel.* In all proceedings under this section, the applicant or recipient and the Department shall have the right to be represented by counsel.

(d) *Procedures, evidence, and record.* (1) The hearing, decision, and any administrative review thereof shall be conducted in conformity with sections 5–8 of the Administrative Procedure Act, and in accordance with such rules of procedure as are proper (and not inconsistent with this section) relating to the conduct of the hearing, giving of notices subsequent to those provided for in paragraph (a) of this section, taking of testimony, exhibits, arguments and briefs, requests for findings, and other related matters. Both the Department and the applicant or recipient shall be entitled to introduce all relevant evidence on the issues as stated in the notice for hearing or as determined by the officer conducting the hearing at the outset of or during the hearing. Any person (other than a Government employee considered to be on official business) who, having been invited or requested to appear and testify as a witness on the Government's behalf, attends at a time and place scheduled for a hearing provided for by this part, may be reimbursed for his travel and actual expenses of attendance in an amount not to exceed the amount payable under the standardized travel regulations to a Government employee traveling on official business.

(2) Technical rules of evidence shall not apply to hearings conducted pursuant to this part, but rules or principles designed to assure production of the most credible evidence available and to subject testimony to test by cross-examination shall be applied where reasonably necessary by the officer conducting the hearing. The hearing officer may exclude irrelevant, immaterial, or unduly repetitious evidence. All documents and other evidence offered or taken for the record shall be open to examination by the parties and opportunity shall be given to refute facts and arguments advanced on either side of the issues. A transcript shall be made of the oral evidence except to the extent the substance thereof is stipulated for the record. All decisions shall be based upon the hearing record and written findings shall be made.

(e) *Consolidated or Joint Hearings.* In cases in which the same or related facts are asserted to constitute noncompliance with this regulation with respect to two or more programs to which this part applies, or noncompliance with this part and the regulations of one or more other Federal departments or agencies issued under Title VI of the Act, the responsible Department official may, by agreement with such other departments or agencies where applicable, provide for the conduct of consolidated or joint hearings, and for the application to such hearings of rules of procedures not inconsistent with this part. Final decisions in such cases, insofar as this regulation is concerned, shall be made in accordance with § 80.10.

(Sec. 602, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d-1) [29 FR 16298, Dec. 4, 1964, as amended at 32 FR 14555, Oct. 19, 1967; 38 FR 17981, 17982, July 5, 1973]

§ 80.10 Decisions and notices.

(a) *Decisions by hearing examiners.* After a hearing is held by a hearing examiner such hearing examiner shall either make an initial decision, if so authorized, or certify the entire record including his recommended findings and proposed decision to the reviewing authority for a final decision, and a copy of such initial decision or certification shall be mailed to the applicant or recipient and to the complainant, if any. Where the initial decision referred to in this paragraph or in paragraph (c) of this section is made by the hearing examiner, the applicant or recipient or the counsel for the Department may, within the period provided for in the rules of procedure issued by the responsible Department official, file with the reviewing authority exceptions to the initial decision, with his reasons therefor. Upon the filing of such exceptions the reviewing authority shall review the initial decision and issue its own decision thereof including the reasons therefor. In the absence of exceptions the initial decision shall constitute the final decision, subject to the provisions of paragraph (e) of this section.

(b) *Decisions on record or review by the reviewing authority.* Whenever a record is certified to the reviewing authority for decision or it reviews the decision of a hearing examiner pursuant to paragraph (a) or (c) of this section, the applicant or recipient shall be given reasonable opportunity to file with it briefs or other written statements of its contentions, and a copy of the final decision of the reviewing authority shall be given in writing to the applicant or recipient and to the complainant, if any.

(c) *Decisions on record where a hearing is waived.* Whenever a hearing is waived pursuant to § 80.9(a) the reviewing authority shall make its final decision on the record or refer the matter to a hearing examiner for an initial decision to be made on the record. A copy of such decision shall be given in writing to the applicant or recipient, and to the complainant, if any.

(d) *Rulings required.* Each decision of a hearing examiner or reviewing authority shall set forth a ruling on each finding, conclusion, or exception presented, and shall identify the requirement or requirements imposed by or pursuant to this part with which it is found that the applicant or recipient has failed to comply.

(e) *Review in certain cases by the Secretary.* If the Secretary has not personally made the final decision referred to in paragraphs (a), (b), or (c) of this section, a recipient or applicant or the counsel for the Department may request the Secretary to review a decision of the Reviewing Authority in accordance with rules of procedure issued by the responsible Department official. Such review is not a matter of right and shall be granted only where the Secretary determines there are special and important reasons therefor. The Secretary may grant or deny such request, in whole or in part. He may also review such a decision upon his own motion in accordance with rules of procedure issued by the responsible Department official. In the absence of a review under this paragraph, a final decision referred to in paragraphs (a), (b), (c) of this section shall become the final decision of the Department when the Secretary transmits it as such to Congressional committees with the report required under section 602 of the Act. Failure of an applicant or recipient to file an exception with the Reviewing Authority or to request review under this paragraph shall not be deemed a failure to exhaust administrative remedies for the purpose of obtaining judicial review.

(f) *Content of orders.* The final decision may provide for suspension or termination of, or refusal to grant or continue Federal financial assistance, in whole or in part, to which this regulation applies, and may contain such terms, conditions, and other provisions as are consistent with and will effectuate the purposes of the Act and this regulation, including provisions designed to assure that no Federal financial assistance to which this regulation applies will thereafter be extended under such law or laws to the applicant or recipient determined by such decision to be in default in its performance of an assurance given by it pursuant to this regulation, or to have otherwise failed to comply with this regulation unless and until it corrects its noncompliance and satisfies the responsible Department official that it will fully comply with this regulation.

(g) *Post-termination proceedings.* (1) An applicant or recipient adversely affected by an order issued under paragraph (f) of this section shall be restored to full eligibility to receive Federal financial assistance if it satisfies the terms and conditions of that order for such eligibility or if it brings itself into compliance with this part and provides reasonable assurance that it will fully comply with this part. An elementary or secondary school or school system which is unable to file an assurance of compliance with § 80.3 shall be restored to full eligibility to receive Federal financial assistance, if it files a court order or a plan for desegregation which meets the requirements of § 80.4(c), and provides reasonable assurance that it will comply with the court order or plan.

(2) Any applicant or recipient adversely affected by an order entered pursuant to paragraph (f) of this section may at any time request the responsible Department official to restore fully its eligibility to receive Federal financial assistance. Any such request shall be supported by information showing that the applicant or recipient has met the requirements of subparagraph (1) of this paragraph. If the responsible Department official determines that those requirements have been satisfied, he shall restore such eligibility.

(3) If the responsible Department official denies any such request, the applicant or recipient may submit a request for a hearing in writing, specifying why it believes such official to have been in error. It shall thereupon be given an expeditious hearing, with a decision on the record, in accordance with rules of procedure issued by the responsible Department official. The applicant or recipient will be restored to such eligibility if it proves at such hearing that it satisfied the requirements of subparagraph (1) of this paragraph. While proceedings under this paragraph are pending, the sanctions imposed by the order issued under paragraph (f) of this section shall remain in effect.

(Sec. 602, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d–1) [29 FR 16298, Dec. 4, 1964, as amended at 32 FR 14555, Oct. 19, 1967; 38 FR 17981, 17982, July 5, 1973]

PART 81—PRACTICE AND PROCEDURE FOR HEARINGS UNDER PART 80 OF THIS TITLE

Subpart A—General Information

Sec.
81.1 Scope of rules.
81.2 Records to be public.
81.3 Use of gender and number.
81.4 Suspension of rules.

Subpart B—Appearance and Practice

81.11 Appearance.
81.12 Authority for representation.
81.13 Exclusion from hearing for misconduct.

Subpart C—Parties

81.21 Parties; General Counsel deemed a party.
81.22 Amici curiae.
81.23 Complainants not parties.

Subpart D—Form, Execution, Service and Filing of Documents

81.31 Form of documents to be filed.
81.32 Signature of documents.
81.33 Filing and service.
81.34 Service—how made.
81.35 Date of service.
81.36 Certificate of service.

Subpart E—Time

81.41 Computation.
81.42 Extension of time or postponement.
81.43 Reduction of time to file documents.

Subpart F—Proceedings Prior to Hearing

81.51 Notice of hearing or opportunity for hearing.
81.52 Answer to notice.
81.53 Amendment of notice or answer.
81.54 Request for hearing.
81.55 Consolidation.
81.56 Motions.
81.57 Responses to motions and petitions.
81.58 Disposition of motions and petitions.

Subpart G—Responsibilities and Duties of Presiding Officer

81.61 Who presides.
81.62 Designation of hearing examiner.
81.63 Authority of presiding officer.

Subpart H—Hearing Procedures

81.71 Statement of position and trial briefs.
81.72 Evidentiary purpose.
81.73 Testimony.
81.74 Exhibits.
81.75 Affidavits.
81.76 Depositions.
81.77 Admissions as to facts and documents.
81.78 Evidence.
81.79 Cross-examination.
81.80 Unsponsored written material.
81.81 Objections.
81.82 Exceptions to rulings of presiding officer unnecessary.

Sec.
81.83 Official notice.
81.84 Public document items.
81.85 Offer of proof.
81.86 Appeals from ruling of presiding officer.

Subpart I—The Record

81.91 Official transcript.
81.92 Record for decision.

Subpart J—Posthearing Procedures, Decisions

81.101 Posthearing briefs; proposed findings and conclusions.
81.102 Decisions following hearing.
81.103 Exceptions to initial or recommended decisions.
81.104 Final decisions.
81.105 Oral argument to the reviewing authority.
81.106 Review by the Secretary.
81.107 Service on amici curiae.

Subpart K—Judicial Standards of Practice

81.111 Conduct.
81.112 Improper conduct.
81.113 Ex parte communications.
81.114 Expeditious treatment.
81.115 Matters not prohibited.
81.116 Filing of ex parte communications.

Subpart L—Posttermination Proceedings

81.121 Posttermination proceedings.

Subpart M—Definitions

81.131 Definitions.

AUTHORITY: The provisions of this Part 81 are issued under 5 U.S.C. 301 and 45 CFR 80.9(d).

SOURCE: The provisions of this Part 81 appear at 32 FR 18156, Nov. 3, 1967, unless otherwise noted.

Subpart A—General Information

§ 81.1 Scope of rules.

The rules of procedure in this part supplement §§ 80.9 and 80.10 of this subtitle and govern the practice for hearings, decisions, and administrative review conducted by the Department of Health, Education, and Welfare, pursuant to Title VI of the Civil Rights Act of 1964 (sec. 602, 78 Stat. 252) and Part 80 of this subtitle.

§ 81.2 Records to be public.

All pleadings, correspondence, exhibits, transcripts of testimony, exceptions, briefs, decisions, and other documents filed in the docket in any proceeding may be inspected and copied in the office of the Civil Rights hearing clerk. Inquiries may be made at the Central Information Center, Department of Health, Education, and Welfare, 330 Independence Avenue SW., Washington, D.C. 20201.

§ 81.3 Use of gender and number.

As used in this part, words importing the singular number may extend and be applied to several persons or things, and vice versa. Words importing the masculine gender may be applied to females or organizations.

§ 81.4 Suspension of rules.

Upon notice to all parties, the reviewing authority or the presiding officer, with respect to matters pending before them, may modify or waive any rule in this part upon determination that no party will be unduly prejudiced and the ends of justice will thereby be served.

Subpart B—Appearance and Practice

§ 81.11 Appearance.

A party may appear in person or by counsel and participate fully in any proceeding. A State agency or a corporation may appear by any of its officers or by any employee it authorizes to appear on its behalf. Counsel must be members in good standing of the bar of a State, Territory, or possession of the United States or of the District of Columbia or the Commonwealth of Puerto Rico.

§ 81.12 Authority for representation.

Any individual acting in a representative capacity in any proceeding may be required to show his authority to act in such capacity.

§ 81.13 Exclusion from hearing for misconduct.

Disrespectful, disorderly, or contumacious language or contemptuous conduct, refusal to comply with directions, or continued use of dilatory tactics by any person at any hearing before a presiding officer shall constitute grounds for immediate exclusion of such person from the hearing by the presiding officer.

Subpart C—Parties

§ 81.21 Parties; General Counsel deemed a party.

(a) The term party shall include an applicant or recipient or other person to whom a notice of hearing or opportunity for hearing has been mailed naming him as respondent.

(b) The General Counsel of the Department of Health, Education, and Welfare shall be deemed a party to all proceedings.

§ 81.22 Amici curiae.

(a) Any interested person or organization may file a petition to participate in a proceeding as an amicus curiae. Such petition shall be filed prior to the prehearing conference, or if none is held, before the commencement of the hearing, unless the petitioner shows good cause for filing the petition later. The presiding officer may grant the petition if he finds that the petitioner has a legitimate interest in the proceedings, that such participation will not unduly delay the outcome, and may contribute materially to the proper disposition thereof. An amicus curiae is not a party and may not introduce evidence at a hearing.

(b) An amicus curiae may submit a statement of position to the presiding officer prior to the beginning of a hearing, and shall serve a copy on each party. The amicus curiae may submit a brief on each occasion a decision is to be made or a prior decision is subject to review. His brief shall be filed and served on each party within the time limits applicable to the party whose position he deems himself to support; or if he does not deem himself to support the position of any party, within the longest time limit applicable to any party at that particular stage of the proceedings.

(c) When all parties have completed their initial examination of a witness, any amicus curiae may request the presiding officer to propound specific questions to the witness. The presiding officer, in his discretion, may grant any such request if he believes the proposed additional testimony may assist materially in elucidating factual matters at issue between the parties and will not expand the issues.

§ 81.23 Complainants not parties.

A person submitting a complaint pursuant to § 80.7(b) of this title is not a party to the proceedings governed by this part, but may petition, after proceedings are initiated, to become an amicus curiae.

Subpart D—Form, Execution, Service and Filing of Documents

§ 81.31 Form of documents to be filed.

Documents to be filed under the rules in this part shall be dated, the original signed in ink, shall show the docket description and title of the proceeding, and shall show the title, if any, and address of the signatory. Copies need not be signed but the name of the person signing the original shall be reproduced. Documents shall be legible and shall not be more than 8½ inches wide and 12 inches long.

§ 81.32 Signature of documents.

The signature of a party, authorized officer, employee or attorney constitutes a certificate that he has read the document, that to the best of his knowledge, information, and belief there is good ground to support it, and that it is not interposed for delay. If a document is not signed or is signed with intent to defeat the purpose of this section, it may be stricken as sham and false and the proceeding may proceed as though the document had not been filed. Similar action may be taken if scandalous or indecent matter is inserted.

§ 81.33 Filing and service.

All notices by a Department official, and all written motions, requests, petitions, memoranda, pleadings, exceptions, briefs, decisions, and correspondence to a Department official from a party, or vice versa, relating to a proceeding after its commencement shall be filed and served on all parties. Parties shall supply the original and two copies of documents submitted for filing. Filings shall be made with the Civil Rights hearing clerk at the address stated in the notice of hearing or notice of opportunity for hearing, during regular business hours. Regular business hours are every Monday through Friday (legal holidays in the District of Columbia excepted) from 9 a.m. to 5:30 p.m., eastern standard or daylight saving time, whichever is effective in the District of Columbia at the time. Originals only of exhibits and transcripts of testimony need be filed. For requirements of service on amici curiae, see § 81.107.

§ 81.34 Service—how made.

Service shall be made by personal delivery of one copy to each person to be served or by mailing by first-class mail, properly addressed with postage prepaid. When a party or amicus has appeared by attorney or other representative, service upon such attorney or representative will be deemed service upon the party or amicus. Documents served by mail preferably should be mailed in sufficient time to reach the addressee by the date on which the original is due to be filed, and should be air mailed if the addressee is more than 300 miles distant.

§ 81.35 Date of service.

The date of service shall be the day when the matter is deposited in the U.S. mail or is delivered in person, except that the date of service of the initial notice of hearing or opportunity for hearing shall be the date of its delivery, or of its attempted delivery if refused.

§ 81.36 Certificate of service.

The original of every document filed and required to be served upon parties to a proceeding shall be endorsed with a certificate of service signed by the party making service or by his attorney or representative, stating that such service has been made, the date of service, and the manner of service, whether by mail or personal delivery.

Subpart E—Time

§ 81.41 Computation.

In computing any period of time under the rules in this part or in an order issued hereunder, the time begins with the day following the act, event, or default, and includes the last day of the period, unless it is a Saturday, Sunday, or legal holiday observed in the District of Columbia, in which event it includes the next following business day. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded from the computation.

§ 81.42 Extension of time or postponement.

Requests for extension of time should be served on all parties and should set forth the reasons for the application. Applications may be granted upon a showing of good cause by the applicant. From the designation of a presiding officer until the issuance of his decision such requests should be addressed to him. Answers to such requests are permitted, if made promptly.

§ 81.43 Reduction of time to file documents.

For good cause, the reviewing authority or the presiding officer, with respect to matters pending before them, may reduce any time limit prescribed by the rules in this part, except as provided by law or in Part 80 of this title.

Subpart F—Proceedings Prior to Hearing

§ 81.51 Notice of hearing or opportunity for hearing.

Proceedings are commenced by mailing a notice of hearing or opportunity for hearing to an affected applicant or recipient, pursuant to § 80.9 of this title.

§ 81.52 Answer to notice.

The respondent, applicant or recipient may file an answer to the notice within 20 days after service thereof. Answers shall admit or deny specifically and in detail each allegation of the notice, unless the respondent party is without knowledge, in which case his answer should so state, and the statement will be deemed a denial. Allegations of fact in the notice not denied or controverted by answer shall be deemed admitted.

Matters alleged as affirmative defenses shall be separately stated and numbered. Failure of the respondent to file an answer within the 20-day period following service of the notice may be deemed an admission of all matters of fact recited in the notice.

§ 81.53 Amendment of notice or answer.

The General Counsel may amend the notice of hearing or opportunity for hearing once as a matter of course before an answer thereto is served, and each respondent may amend his answer once as a matter of course not later than 10 days before the date fixed for hearing but in no event later than 20 days from the date of service of his original answer. Otherwise a notice or answer may be amended only by leave of the presiding officer. A respondent shall file his answer to an amended notice within the time remaining for filing the answer to the original notice or within 10 days after service of the amended notice, whichever period may be the longer, unless the presiding officer otherwise orders.

§ 81.54 Request for hearing.

Within 20 days after service of a notice of opportunity for hearing which does not fix a date for hearing the respondent, either in his answer or in a separate document, may request a hearing. Failure of the respondent to request a hearing shall be deemed a waiver of the right to a hearing and to constitute his consent to the making of a decision on the basis of such information as is available.

§ 81.55 Consolidation.

The responsible Department official may provide for proceedings in the Department to be joined or consolidated for hearing with proceedings in other Federal departments or agencies, by agreement with such other departments or agencies. All parties to any proceeding consolidated subsequently to service of the notice of hearing or opportunity for hearing shall be promptly served with notice of such consolidation.

§ 81.56 Motions.

Motions and petitions shall state the relief sought, the authority relied upon, and the facts alleged. If made before or after the hearing, these matters shall be in writing. If made at the hearing, they may be stated orally; but the presiding officer may require that they be reduced to writing and filed and served on all parties in the same manner as a formal motion. Motions, answers, and replies shall be addressed to the presiding officer, if the case is pending before him. A repetitious motion will not be entertained.

§ 81.57 Responses to motions and petitions.

Within 8 days after a written motion or petition is served, or such other period as the reviewing authority or the presiding officer may fix, any party may file a response thereto. An immediate oral response may be made to an oral motion.

§ 81.58 Disposition of motions and petitions.

The reviewing authority or the presiding officer may not sustain or grant a written motion or petition prior to expiration of the time for filing responses thereto, but may overrule or deny such motion or petition without awaiting response: *Provided, however,* That prehearing conferences, hearings and decisions need not be delayed pending disposition of motions or petitions. Oral motions and petitions may be ruled on immediately. Motions and petitions submitted to the reviewing authority or the presiding officer, respectively, and not disposed of in separate rulings or in their respective decisions will be deemed denied. Oral arguments shall not be held on written motions or petitions unless the presiding officer in his discretion expressly so orders.

Subpart G—Responsibilities and Duties of Presiding Officer

§ 81.61 Who presides.

A hearing examiner assigned under 5 U.S.C. 3105 or 3344 (formerly sec. 11 of the Administrative Procedure Act) shall preside over the taking of evidence in any hearing to which these rules of procedure apply.

§ 81.62 Designation of hearing examiner.

The designation of the hearing examiner as presiding officer shall be in writing, and shall specify whether the examiner is to make an initial decision or to certify the entire record including his recommended findings and proposed decision to the reviewing authority, and may also fix the time and place of hearing. A copy of such order shall be served on all parties. After service of an order designating a hearing examiner to preside, and until such examiner makes his decision, motions and petitions shall be submitted to him. In the case of the death, illness, disqualification or unavailability of the designated hearing examiner, another hearing examiner may be designated to take his place.

§ 81.63 Authority of presiding officer.

The presiding officer shall have the duty to conduct a fair hearing, to take all necessary action to avoid delay, and to maintain order. He shall have all powers necessary to these ends, including (but not limited to) the power to:

(a) Arrange and issue notice of the date, time, and place of hearings, or, upon due notice to the parties, to change the date, time, and place of hearings previously set.

(b) Hold conferences to settle, simplify, or fix the issues in a proceeding, or to consider other matters that may aid in the expeditious disposition of the proceeding.

(c) Require parties and amici curiae to state their position with respect to the various issues in the proceeding.

(d) Administer oaths and affirmations.

(e) Rule on motions, and other procedural items on matters pending before him.

(f) Regulate the course of the hearing and conduct of counsel therein.

(g) Examine witnesses and direct witnesses to testify.

(h) Receive, rule on, exclude or limit evidence.

(i) Fix the time for filing motions, petitions, briefs, or other items in matters pending before him.

(j) Issue initial or recommended decisions.

(k) Take any action authorized by the rules in this part or in conformance with the provisions of 5 U.S.C. 551–559 (the Administrative Procedure Act).

Subpart H—Hearing Procedures

§ 81.71 Statement of position and trial briefs.

The presiding officer may require parties and amici curiae to file written statements of position prior to the beginning of a hearing. The presiding officer may also requre the parties to submit trial briefs.

§ 81.72 Evidentiary purposes.

(a) The hearing is directed to receiving factual evidence and expert opinion testimony related to the issues in the proceeding. Argument will not be received in evidence; rather it should be presented in statements, memoranda, or briefs, as determined by the presiding officer. Brief opening statements, which shall be limited to statement of the party's position and what he intends to prove, may be made at hearings.

(b) Hearings for the reception of evidence will be held only in cases where issues of fact must be resolved in order to determine whether the respondent has failed to comply with one or more applicable requirements of Part 80 of this title. In any case where it appears from the respondent's answer to the notice of hearing or opportunity for hearing, from his failure timely to answer, or from his admissions or stipulations in the record, that there are no matters of material fact in dispute, the reviewing authority or presiding officer may enter an order so finding, vacating the hearing date if one has been set, and fixing the time for filing briefs under § 81.101. Thereafter the proceedings shall go to conclusion in accordance with Subpart J of this part. The presiding officer may allow an appeal from such order in accordance with § 81.86.

§ 81.73 Testimony.

Testimony shall be given orally under oath or affirmation by witnesses at the hearing; but the presiding officer, in his discretion, may require or permit that the direct testimony of any witness be prepared in writing and served on all parties in advance of the hearing. Such testimony may be adopted by the witness at the hearing, and filed as part of the record thereof. Unless authorized by the presiding officer, witnesses will not be permitted to read prepared testimony into the record. Except as provided in §§ 81.75 and 81.76, witnesses shall be available at the hearing for cross-examination.

§ 81.74 Exhibits.

Proposed exhibits shall be exchanged at the prehearing conference, or otherwise prior to the hearing if the presiding officer so requires. Proposed exhibits not so exchanged may be denied admission as evidence. The authenticity of all proposed exhibits exchanged prior to hearing will be deemed admitted unless written objection thereto is filed prior to the hearing or unless good cause is shown at the hearing for failure to file such written objection.

§ 81.75 Affidavits.

An affidavit is not inadmissible as such. Unless the presiding officer fixes other time periods affidavits shall be filed and served on the parties not later than 15 days prior to the hearing; and not less than 7 days prior to hearing a party may file and serve written objection to any affidavit on the ground that he believes it necessary to test the truth of assertions therein at hearing. In such event the assertions objected to will not be received in evidence unless the affiant is made available for cross-examination, or the presiding officer determines that cross-examination is not necessary for the full and true disclosure of facts referred to in such assertions. Notwithstanding any objection, however, affidavits may be considered in the case of any respondent who waives a hearing.

§ 81.76 Depositions.

Upon such terms as may be just, for the convenience of the parties or of the Department, the presiding officer may authorize or direct the testimony of any witness to be taken by deposition.

§ 81.77 Admissions as to facts and documents.

Not later than 15 days prior to the scheduled date of the hearing except for good cause shown, or prior to such earlier date as the presiding officer may order, any party may serve upon an opposing party a written request for the admission of the genuineness and authenticity of any relevant documents described in and exhibited with the request, or for the admission of the truth of any relevant matters of fact stated in the request. Each of the matters of which an admission is requested shall be deemed admitted, unless within a period designated in the request (not less than 10 days after service thereof, or within such further time as the presiding officer or the reviewing authority if no presiding officer has yet been designated may allow upon motion and notice) the party to whom the request is directed serves upon the requesting party a sworn statement either denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he cannot truthfully either admit or deny such matters. Copies of requests for admission and answers thereto shall be served on all parties. Any admission made by a party to such request is only for the purposes of the pending proceeding, or any proceeding or action instituted for the enforcement of any order entered therein, and shall not constitute an admission by him for any other purpose or be used against him in any other proceeding or action.

§ 81.78 Evidence.

Irrelevant, immaterial, unreliable, and unduly repetitious evidence will be excluded.

§ 81.79 Cross-examination.

A witness may be cross-examined on any matter material to the proceeding without regard to the scope of his direct examination.

§ 81.80 Unsponsored written material.

Letters expressing views or urging action and other unsponsored written material regarding matters in issue in a hearing will be placed in the correspondence section of the docket of the proceeding. These data are not deemed part of the evidence or record in the hearing.

§ 81.81 Objections.

Objections to evidence shall be timely and briefly state the ground relied upon.

§ 81.82 Exceptions to rulings of presiding officer unnecessary.

Exceptions to rulings of the presiding officer are unnecessary. It is sufficient that a party, at the time the ruling of the presiding officer is sought, makes known the action which he desires the presiding officer to take, or his objection to an action taken, and his grounds therefor.

§ 81.83 Official notice.

Where official notice is taken or is to be taken of a material fact not appearing in the evidence of record, any party, on timely request, shall be afforded an opportunity to show the contrary.

§ 81.84 Public document items.

Whenever there is offered (in whole or in part) a public document, such as an official report, decision, opinion, or published scientific or economic statistical data issued by any of the executive departments (or their subdivisions), legislative agencies or committees, or administrative agencies of the Federal Government (including Government-owned corporations), or a similar document issued by a State or its agencies, and such document (or part thereof) has been shown by the offeror to be reasonably available to the public, such document need not be produced or marked for identification, but may be offered for official notice, as a public document item by specifying the document or relevant part thereof.

§ 81.85 Offer of proof.

An offer of proof made in connection with an objection taken to any ruling of the presiding officer rejecting or excluding proffered oral testimony shall consist of a statement of the substance of the evidence which counsel contends would be adduced by such testimony; and, if the excluded evidence consists of evidence in documentary or written form or of reference to documents or records, a copy of such evidence shall be marked for identification and shall accompany the record as the offer of proof.

§ 81.86 Appeals from ruling of presiding officer.

Rulings of the presiding officer may not be appealed to the reviewing authority prior to his consideration of the entire proceeding except with the consent of the presiding officer and where he certifies on the record or in writing that the allowance of an interlocutory appeal is clearly necessary to prevent exceptional delay, expense, or prejudice to any party, or substantial detriment to the public interest. If an appeal is allowed, any party may file a brief with the reviewing authority within such period as the presiding officer directs. No oral argument will be heard unless the reviewing authority directs otherwise. At any time prior to submission of the proceeding to it for decision, the reviewing authority may direct the presiding officer to certify any question or the entire record to it for decision. Where the entire record is so certified, the presiding officer shall recommend a decision.

Subpart I—The Record

§ 81.91 Official transcript.

The Department will designate the official reporter for all hearings. The official transcripts of testimony taken, together with any exhibits, briefs, or memoranda of law filed therewith shall be filed with the Department. Transcripts of testimony in hearings may be obtained from the official reporter by the parties and the public at rates not to exceed the maximum rates fixed by the contract between the Department and the reporter. Upon notice to all parties, the presiding officer may authorize corrections to the transcript which involve matters of substance.

§ 81.92 Record for decision.

The transcript of testimony, exhibits, and all papers and requests filed in the proceedings, except the correspondence section of the docket, including rulings and any recommended or initial decision shall constitute the exclusive record for decision.

Subpart J—Posthearing Procedures, Decisions

§ 81.101 Posthearing briefs; proposed findings and conclusions.

(a) The presiding officer shall fix the time for filing posthearing briefs, which may contain proposed findings of fact and conclusions of law, and, if permitted, reply briefs.

(b) Briefs should include a summary of the evidence relied upon together with references to exhibit numbers and pages of the transcript, with citations of the authorities relied upon.

§ 81.102 Decisions following hearing.

When the time for submission of posthearing briefs has expired, the presiding officer shall certify the entire record, including his recommended findings and proposed decision, to the responsible De-

partment official; or if so authorized he shall make an initial decision. A copy of the recommended findings and proposed decision, or of the initial decision, shall be served upon all parties, and amici, if any.

§ 81.103 Exceptions to initial or recommended decisions.

Within 20 days after the mailing of an initial or recommended decision, any party may file exceptions to the decision, stating reasons therefor, with the reviewing authority. Any other party may file a response thereto within 30 days after the mailing of the decision. Upon the filing of such exceptions, the reviewing authority shall review the decision and issue its own decision thereon.

§ 81.104 Final decisions.

(a) Where the hearing is conducted by a hearing examiner who makes an initial decision, if no exceptions thereto are filed within the 20-day period specified in § 81.103, such decision shall become the final decision of the Department, and shall constitute "final agency action" within the meaning of 5 U.S.C. 704 (formerly section 10(c) of the Administrative Procedure Act), subject to the provisions of § 81.106.

(b) Where the hearing is conducted by a hearing examiner who makes a recommended decision, or upon the filing of exceptions to a hearing examiner's initial decision, the reviewing authority shall review the recommended or initial decision and shall issue its own decision thereon, which shall become the final decision of the Department, and shall constitute "final agency action" within the meaning of 5 U.S.C. 704 (formerly section 10(c) of the Administrative Procedure Act), subject to the provisions of § 81.106.

(c) All final decisions shall be promptly served on all parties, and amici, if any.

§ 81.105 Oral argument to the reviewing authority.

(a) If any party desires to argue a case orally on exceptions or replies to exceptions to an initial or recommended decision, he shall make such request in writing. The reviewing authority may grant or deny such requests in its discretion. If granted, it will serve notice of oral argument on all parties. The notice will set forth the order of presentation, the amount of time allotted, and the time and place for argument. The names of persons who will argue should be filed with the Department hearing clerk not later than 7 days before the date set for oral argument.

(b) The purpose of oral argument is to emphasize and clarify the written argument in the briefs. Reading at length from the brief or other texts is not favored. Participants should confine their arguments to points of controlling importance and to points upon which exceptions have been filed. Consolidations of appearances at oral argument by parties taking the same side will permit the parties' interests to be presented more effectively in the time allotted.

(c) Pamphlets, charts, and other written material may be presented at oral argument only if such material is limited to facts already in the record and is served on all parties and filed with the Department hearing clerk at least 7 days before the argument.

§ 81.106 Review by the Secretary.

Within 20 days after an initial decision becomes a final decision pursuant to § 81.104(a) or within 20 days of the mailing of a final decision referred to in § 81.104(b), as the case may be, a party may request the Secretary to review the final decision. The Secretary may grant or deny such request, in whole or in part, or serve notice of his intent to review the decision in whole or in part upon his own motion. If the Secretary grants the requested review, or if he serves notice of intent to review upon his own motion, each party to the decision shall have 20 days following notice of the Secretary's proposed action within which to file exceptions to the decision and supporting briefs and memoranda, or briefs and memoranda in support of the decision. Failure of a party to request review under this paragraph shall not be deemed a failure to exhaust administrative remedies for the purpose of obtaining judicial review.

§ 81.107 Service on amici curiae.

All briefs, exceptions, memoranda, requests, and decisions referred to in this subpart J shall be served upon amici curiae at the same times and in the same manner required for service on parties. Any written statements of position and trial briefs required of parties under § 81.71 shall be served on amici.

Subpart K—Judicial Standards of Practice

§ 81.111 Conduct.

Parties and their representatives are expected to conduct themselves with honor and dignity and observe judicial standards of practice and ethics in all proceedings. They should not indulge in offensive personalities, unseemly wrangling, or intemperate accusations or characterizations. A representative of any party whether or not a lawyer shall observe the traditional responsibilities of lawyers as officers of the court and use his best efforts to restrain his client from improprieties in connection with a proceeding.

§ 81.112 Improper conduct.

With respect to any proceeding it is improper for any interested person to attempt to sway the judgment of the reviewing authority by undertaking to bring pressure or influence to bear upon any officer having a responsibility for a decision in the proceeding, or his decisional staff. It is improper that such interested persons or any members of the Department's staff or the presiding officer give statements to communications media, by paid advertisement or otherwise, designed to influence the judgment of any officer having a responsibility for a decision in the proceeding, or his decisional staff. It is improper for any person to solicit communications to any such officer, or his decisional staff, other than proper communications by parties or amici curiae.

§ 81.113 Ex parte communications.

Only persons employed by or assigned to work with the reviewing authority who perform no investigative or prosecuting function in connection with a proceeding shall communicate ex parte with the reviewing authority, or the presiding officer, or any employee or person involved in the decisional process in such proceedings with respect to the merits of that or a factually related proceeding. The reviewing authority, the presiding officer, or any employee or person involved in the decisional process of a proceeding shall communicate ex parte with respect to the merits of that or a factually related proceeding only with persons employed by or assigned to work with them and who perform no investigative or prosecuting function in connection with the proceeding.

§ 81.114 Expeditious treatment.

Requests for expeditious treatment of matters pending before the responsible Department official or the presiding officer are deemed communications on the merits, and are improper except when forwarded from parties to a proceeding and served upon all other parties thereto. Such communications should be in the form of a motion.

§ 81.115 Matters not prohibited.

A request for information which merely inquires about the status of a proceeding without discussing issues or expressing points of view is not deemed an ex parte communication. Such requests should be directed to the Civil Rights hearing clerk. Communications with respect to minor procedural matters or inquiries or emergency requests for extensions of time are not deemed ex parte communications prohibited by § 81.113. Where feasible, however, such communications should be by letter with copies to all parties. Ex parte communications between a respondent and the responsible Department official or the Secretary with respect to securing such respondent's voluntary compliance with any requirement of Part 80 of this title are not prohibited.

§ 81.116 Filing of ex parte communications.

A prohibited communication in writing received by the Secretary, the reviewing authority, or by the presiding officer, shall be made public by placing it in the correspondence file of the docket in the case and will not be considered as part of the record for decision. If the prohibited communication is received orally, a memorandum setting forth its substance shall be made and filed in the correspondence section of the docket in the case. A person referred to in such memorandum may file a comment for inclusion in the docket if he considers the memorandum to be incorrect.

Subpart L—Postermination Proceedings

§ 81.121 Postermination proceedings.

(a) An applicant or recipient adversely affected by the order terminating, discontinuing, or refusing Federal financial assistance in consequence of proceedings pursuant to this title may request the responsible Department official for an order authorizing payment, or permitting resumption, of Federal financial assistance. Such request shall be in writing and shall affirmatively show that since entry of the order, it has brought its program or activity into compliance with the requirements of the Act, and with the Regulation thereunder, and shall set forth specifically, and in detail, the steps which it has taken to achieve such compliance. If the responsible Department official denies such request the applicant or recipient shall be given an expeditious hearing if it so requests in writing and specifies why it believes the responsible Department official to have been in error. The request for such a hearing shall be addressed to the responsible Department official and shall be made within 30 days after the applicant or recipient is informed that the responsible Department official has refused to authorize payment or permit resumption of Federal financial assistance.

(b) In the event that a hearing shall be requested pursuant to subparagraph (a) of this section, the hearing procedures established by this part shall be applicable to the proceedings, except as otherwise provided in this section.

Subpart M—Definitions

§ 81.131 Definitions.

The definitions contained in § 80.13 of this subtitle apply to this part, unless the context otherwise requires, and the term "reviewing authority" as used herein includes the Secretary of Health, Education, and Welfare, with respect to action by that official under § 81.106.

Transition provisions: (a) The amendments herein shall become effective upon publication in the FEDERAL REGISTER.

(b) These rules shall apply to any proceeding or part thereof to which Part 80 of this title as amended effective October 19, 1967 (published in the FEDERAL REGISTER for Oct. 19, 1967), and as the same may be hereafter amended, applies. In the case of any proceeding or part thereof governed by the provisions of Part 80 as that part existed prior to such amendment, the rules in this Part 81 shall apply as if these amendments were not in effect.

[FR Doc.77-12620 Filed 4-28-77;4:35 pm]

federal register

TUESDAY, AUGUST 23, 1977

PART II

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Office of Education

■

EDUCATION OF HANDICAPPED CHILDREN

Implementation of Part B of the Education of the Handicapped Act

Title 45—Public Welfare

CHAPTER I—OFFICE OF EDUCATION, DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

EDUCATION OF HANDICAPPED CHILDREN

Implementation of Part B of the Education of the Handicapped Act

AGENCY: U.S. Office of Education, HEW.

ACTION: Final regulation.

SUMMARY: These regulations implement amendments to Part B of the Education of the Handicapped Act (as required by the Education for All Handicapped Children Act of 1975) by: (1) amending the existing regulations governing assistance to States for education of handicapped children, (2) adding a new part on incentive grants programs for handicapped children aged three through five, and (3) making certain conforming amendments to the general provisions for State-administered programs.

These regulations govern the provision of formula grant funds to State and local educational agencies to assist them in the education of handicapped children.

The regulations include provisions which are designed (1) to assure that all handicapped children have available to them a free appropriate public education; (2) to assure that the rights of handicapped children and their parents are protected; (3) to assist States and localities to provide for the education of handicapped children; and (4) to assess and assure the effectiveness of efforts to educate such children.

These regulations also include the final rules for counting and reporting handicapped children. (The child count rules were published in proposed form on September 8, 1976, and were incorporated into the December 30 proposed regulations for the convenience of the reader.)

EFFECTIVE DATE: October 1, 1977.

FOR FURTHER INFORMATION CONTACT:

Daniel Ringelheim, Director, Division of Assistance to States, Bureau of Education for the Handicapped, 400 Maryland Ave. SW., (room 4046 Donohoe Building), Washington, D.C. 20202, telephone: 202-472-2265;

or

Thomas B. Irvin, Policy Officer, Bureau of Education for the Handicapped, 400 Maryland Ave. SW., (room 4926 Donohoe Building), Washington, D.C. 20202, telephone: 202-245-9405.

SUPPLEMENTARY INFORMATION:

RULEMAKING HISTORY—PUBLIC PARTICIPATION

Because of the potential impact that Pub. L. 94-142 will have on the education of handicapped children throughout the Nation, and on the agencies that serve them, the Office of Education recognized the need for intensive public participation in the development of regulations, and took steps to insure maximum public involvement throughout the entire rulemaking process. A description of these steps is included in the following paragraphs:

Before the proposed rules were drafted, the Office of Education carried out a massive effort to obtain comments and suggestions for developing regulations from interested parties throughout the Nation. This involved participating in approximately 20 meetings about the law conducted on both a geographic and special interest basis. Approximately 2,200 people participated in these meetings and several hundred comments were received.

In June 1976, the Office of Education convened a national writing group of approximately 170 people to develop concept papers for use in writing the regulations. This group was composed of parents, representatives of special interest organizations (i.e., AFT, NEA, private schools), and administrators of State and local schools. These concept papers formed the basis for the proposed regulations.

During the months of July–November, the Office of Education prepared several redrafts of the concept papers and continued to seek inputs on these drafts from various interested parties.

On December 30, 1976, the proposed rules were published in the FEDERAL REGISTER. Written comments and recommendations on the proposed rules were invited for a 60-day comment period ending March 1, 1977; and public hearings were held in Washington, San Francisco, Denver, Chicago, Boston, and Atlanta. Over 1,600 written comments were received during that period, all of which were reviewed and considered by the Office of Education in preparing these final regulations.

The tapes of the hearings and copies of written comments are available for public inspection at the Bureau of Education for the Handicapped, room 4921, Donohoe Building, 400 6th Street SW., Washington, D.C. 20202.

In addition to the above public comment activities, the Office of Education continued with other public participation efforts, including:

(1) Participating in 10 regional meetings of the American Association of School Administrators and other regional meetings with the Council of the Great City Schools;

(2) Conducting a national conference on the regulations for administrators of various State agency programs for the handicapped, and participating in meetings at other national conferences; and

(3) Participating in a special series of meetings organized by the Institute for Educational Leadership and composed of representatives of the National Governors' Conference, the National Conference of State Legislatures, the National Association of State Boards of Education, and the Education Commission of the States.

ACTION TAKEN ON PUBLIC COMMENTS

PART 100B—STATE ADMINISTERED PROGRAMS

No comments were received on the proposed amendments to Part 100b, and no changes have been made.

PART 121B—ASSISTANCE TO STATES FOR EDUCATION OF HANDICAPPED CHILDREN

The Office of Education conducted a careful review of the public comments received and summarized them by subpart and topic.

A very large number of comments dealt with specific statutory requirements. These comments expressed concerns about the statute and suggested changes to be made in the statutory provisions. However, because they are statutory, the Office of Education is not able to make any changes in the regulations with respect to those points. Some of the statutory provisions on which comments were received, together with concerns about them, are included below:

(1) Free appropriate public education—problems with timelines and concerns about the cost of implementing this requirement;

(2) Priorities—concerns about Federal priorities which are not consistent with State and local priorities;

(3) Individualized education programs—suggestions that the requirement be deleted from the regulation unless more funds are available for implementing it;

(4) Prior notice and other due process procedures—concerns about the amount of detail in these requirements and the time, cost and paper work involved in their implementation;

(5) State educational agency responsibility for general supervision of all special education programs in the State—concerns about lack of authority over other State agencies and the lack of funds to efficiently implement the provision;

(6) Child count—concerns about the dates on which the count must be taken.

Another large number of commenters cited specific concerns or issues with respect to the content of the proposed rules. Because of the large number of comments received, individual comments have been consolidated.

PART 121M—INCENTIVE GRANTS

Part 121m sets forth the conditions under which States may receive grants to assist in the education of handicapped children aged three through five. Congress established incentive grants in the recognition that when education begins at the earlier stages of development (1) benefits are maximized, (2) additional or more severe handicaps may be prevented, and (3) greater long-term cost effectiveness is realized.

Comment: An issue was raised concerning the possible use of incentive grant funds for children from birth through two years of age.

Response: Section 619 of the Act and the legislative history specify that the use of incentive grant funds is limited to children aged three through five years. However, the State's entitlement under section 611 of the Act may be used for children from birth through age twenty-one.

Comment: An issue was raised as to whether incentive grant funds may be

used for administrative or supervisory costs.

Response: The regulation has been amended to make it clear that administrative costs are allowable.

MINIMUM REGULATION—FUTURE RULEMAKING PLANS

The preamble to the proposed rules contained the following statement regarding minimum regulations:

The Department sees the development of regulations for implementing Pub. L. 94-142 as being an evolutionary process which will continue over a period of several years. The actual impact and consequences of the statutory provisions and problems which State and local educational agencies may have in implementing these provisions are not known at this time. Therefore, the Department feels that the most rational approach to follow is (1) to write minimum regulations at this point, and (2) to amend and revise such regulations in the future as need and experience dictate.

Because the Statute is very comprehensive and specific on many points, the Department has elected (1) to incorporate the basic wording or substance of the Statute directly into the regulations, and (2) to expand on the statutory provisions only where additional interpretation sems to be necessary.

Although some commenters felt that more extensive regulations were necessary, many persons who responded to the proposed rules felt that the Office of Education had already over-regulated and should cut back on the rules when they are published in final form. At this juncture, the Office of Education holds to the same position that it took in the proposed rules, and for the same reasons as set forth in that document.

The Office of Education believes that some working experience with this regulation is essential before determining whether there is a need to amend it. Once the regulation becomes effective (Oct. 1, 1977) and people gain experience in implementing it, there will likely be a series of questions raised in individual States which could result in the development of policies and interpretations that would be proposed for addition to these regulations.

OVERVIEW OF CHANGES IN THE PART 121a REGULATIONS

A substantial number of changes have been made in response to comments received on the proposed rules. However, few of these changes have resulted in adding major substantive requirements. Most of the changes are technical or have been made in an attempt to provide greater clarity or to add more explanatory material.

Extensive use has been made of explanatory comments in the text of the regulations. The purpose of these comments is to attempt, where appropriate, to clarify or further interpret a particular rule, or to provide direction and assistance without imposing additional requirements. For example, an extensive explanation is included under the excess cost requirement and an example is given on how to make the computation under that requirement.

ORGANIZATION OF REGULATIONS

Three parts of Title 45 of the Code of Federal Regulations are amended by this document:

(1) Part 100b—*State Administered Programs.* This includes certain conforming amendments to the regulations under section 434(b)(1)(A) of the General Education Provisions Act.

(2) Part 121a—*Assistance to States for Education of Handcapped Children.* This is divided into seven subparts: (A) General, (B) State Annual Program Plans and Local Applications, (C) Services, (D) Private Schools, (E) Procedural Safeguards, (F) State Administration, and (G) Allocation of Funds and Reports.

(3) Part 121m—*Incentive Grants.* This governs the administration of the incentive grants program for handicapped children aged three through five, authorized under section 619 of the Act.

ANALYSIS OF REGULATIONS

Appendix A of Part 121a includes an analysis of each subpart, which (1) discusses significant comments received and the action taken with respect to those comments, and (2) explains the basis for any changes made from the proposed rules published on December 30, 1976.

TOPICAL INDEX

Appendix B of Part 121a includes an index of the major topics in the regulations (e.g., free appropriate public education, priorities, and individualized education program) and the specific sections under which each term is used.

NOTE.—The Department of Health, Education, and Welfare, has determined that this document contains a major proposal requiring preparation of an Economic Impact Analysis (EIA) Statement under Executive Orders 11821 and 11949 and OMB Circular A-107, and certifies that an Economic Impact Analysis has been prepared. However, because the portion of this regulation involving major costs is virtually identical to the content of subpart D of the regulation issued on discrimination against the handicapped under section 504 of the Rehabilitation Act of 1973 (45 CFR Part 84; published May 4, 1977, at 42 FR 22675), the Department has determined that (a) this regulation involves no substantial costs not imposed by Part 84 and (b) the pertinent parts of the EIA Statement for that regulation meet the EIA requirements for this regulation. Both regulations impose the following requirements: (1) appropriate education to handicapped children; (2) identification and evaluation of handicapped children; and (3) procedural safeguards for handicapped children and their parents.

(Catalog of Federal Domestic Assistance Number 13.449, Education of Handicapped Children, Part B.)

Dated: August 12, 1977.

JOHN ELLIS,

Acting U.S. Commissioner of Education.

Approved: August 15, 1977.

HALE CHAMPION,

Acting Secretary of Health, Education, and Welfare.

Title 45 of the Code of Federal Regulations is amended as follows:

PART 100b—STATE ADMINISTERED PROGRAMS

1. In Part 100b, § 100b.17 is revised to read as follows:

§ 100b.17 General applications.

(a) The general application of a State must meet the requirements of section 434(b)(1)(A) of the General Education Provisions Act.

(b) A State does not have to resubmit its general application.

(20 U.S.C. 1232c(b)(1)(A).)

(c)(1) The following statutes require that a State must submit certain provisions to the Commissioner which are similar to provisions in the general application.

(2) Subject to paragraph (d) of this section, if the Commissioner has approved a State's general application, the State does not have to submit the provisions required under the following statutes:

(i) *Compensatory education.* Section 142(a) (2) and (3) of Title I of the Elementary and Secondary Education Act of 1965, as amended.

(20 U.S.C. 1232c(b)(1)(A)(ii) (II), (III).)

(ii) *School library resources.* Section 203(a) (5), (6) and (7) of Title II of the Elementary and Secondary Education Act of 1965, as amended.

(20 U.S.C. 1232c(b)(1)(A)(ii) (II), (III), and (IV).)

(iii) *Supplementary educational centers and services; guidance, counseling, and testing.* Section 305(b) (9)(B), (10), and (11) of Title II of the Elementary and Secondary Education Act of 1965, as amended.

(20 U.S.C. 1232c(b)(1)(A)(ii) (II), (III) and (IV).)

(iv) *Education of the handicapped.* Section 613(a) (7)(A), (9)(B), and (10) of Part B of the Education of the Handicapped Act, as amended.

(20 U.S.C. 1232c(b)(1)(A)(ii) (II), (III) and (IV).)

(v) *Adult education.* Section 306(a) (6) and (7) of the Adult Education Act, as amended.

(20 U.S.C. 1232c(b)(1)(A)(ii) (II), (III).)

(vi) *Strengthening instruction in academic subjects.* Section 1004(a) (2) and (3) of Title X of the National Defense Education Act of 1958, as amended.

(20 U.S.C. 1232c(b)(1)(A)(ii), (II), (III).)

(vii) *State reading improvement programs.* Section 714(a)(10) of Title VII-B of the Education Amendments of 1974.

(20 U.S.C. 1232c(b)(1)(A)(ii), (III).)

(d)(1) The general application does not change the legal substance of the provisions listed under paragraph (c)(2) of this section.

145 147

(2) If a provision listed in paragraph (c) (2) of this section is different in wording from an assurance in the general application, the provision listed in that paragraph governs any question of compliance with the assurance.

(20 U.S.C. 1232c(b)(1)(B)(i), (b)(1)(B)(iii), (b)(2).)

2. In Part 100b, § 100b.35 is revised to read as follows:

§ 100b.35 Effective date of an application, plan, or amendment.

(a) Federal funds are available only for obligations incurred under:

(1) A State plan approved by the Commissioner (in the case of the programs set forth in § 100b.10 other than those referenced in § 100b.15(a)); or

(2) A general application and an annual program plan approved by the Commissioner in the case of the programs referenced in § 100b.15(a)).

(b) A State plan, general application, annual program plan, or amendment to any of them, is effective on the date the State submits it to the Federal Government in substantially approvable form. However, the effective date cannot be earlier than the first day of the fiscal period for which it is submitted.

(c) The Commissioner sends the State agency a notice of approval, including notice of the effective date, when the application, plan, or amendment is approved.

(d) Federal funds are not available for obligation by a State or local agency before the effective date of the State plan or annual program plan (whichever is submitted under paragraph (a) of this section). If funds are expressly made available by statute for the development of the State plan, general application, or annual program plan, the first sentence of this paragraph does not apply to obligations by the State for that purpose.

(20 U.S.C. 1221e-3(a)(1).)

3. In Part 100b, § 100b.55 is revised to read as follows:

§ 100b.55 Obligation by recipients.

(a) *Period for obligation.* Federal funds which the Federal government may obligate during a fiscal period remain available for obligation by State and local recipients through the end of that fiscal period. Federal funds made available for construction of facilities remain available for obligation by State and local recipients for that purpose for a reasonable period of time as determined by the Commissioner.

(b) *Carryovers.* In accordance with section 414(b) of the General Education Provisions Act, any Federal funds which are not obligated by State and local recipients before the end of the fiscal period under paragraph (a) of this section, remain available for obligation by those agencies for one additional fiscal year.

(c) *Determinations of obligation.* (1) An obligation for the acquisition of real or personal property, for the construction of facilities, or for the performance of work, is incurred by a recipient on the date it makes a binding written commitment.

(2) An obligation for personal services, for services performed by public utilities, for travel, or for the rental of real or personal property, is incurred by a recipient on the date it receives the services, its personnel takes the travel, or it uses the rented property.

(20 U.S.C. 1221c(a); 1225(b); 1232c(b)(1)(A)(ii)(II).)

4. Part 121a is revised to read as follows:

PART 121a—ASSISTANCE TO STATES FOR EDUCATION OF HANDICAPPED CHILDREN

Subpart A—General

PURPOSE, APPLICABILITY, AND GENERAL PROVISIONS REGULATIONS

Sec.
121a.1 Purpose.
121a.2 Applicability to State, local, and private agencies.
121a.3 General provisions regulations.

DEFINITIONS

121a.4 Free appropriate public education.
121a.5 Handicapped children.
121a.6 Include.
121a.7 Intermediate educational unit.
121a.8 Local educational agency.
121a.9 Native language.
121a.10 Parent.
121a.11 Public agency.
121a.12 Qualified.
121a.13 Related services.
121a.14 Special education.
121a.15 State.

Subpart B—State Annual Program Plans and Local Applications

ANNUAL PROGRAM PLANS—GENERAL

121a.110 Condition of assistance.
121a.111 Contents of plan.
121a.112 Certification by the State educational agency and attorney general.
121a.113 Approval; disapproval.
121a.114 Effective period of annual program plan.

ANNUAL PROGRAM PLANS—CONTENTS

121a.120 Public participation.
121a.121 Right to a free appropriate public education.
121a.122 Timelines and ages for free appropriate public education.
121a.123 Full educational opportunity goal.
121a.124 Full educational opportunity goal—data requirement.
121a.125 Full educational opportunity goal—timetable.
121a.126 Full educational opportunity goal—facilities, personnel, and services.
121a.127 Priorities.
121a.128 Identification, location, and evaluation of handicapped children.
121a.129 Confidentiality of personally identifiable information.
121a.130 Individualized education programs.
121a.131 Procedural safeguards.
121a.132 Least restrictive environment.
121a.133 Protection in evaluation procedures.
121a.134 Responsibility of State educational agency for all educational programs.
121a.135 Monitoring procedures.
121a.136 Implementation procedures—State educational agency.
121a.137 Procedures for consultation.
121a.138 Other Federal programs.
121a.139 Comprehensive system of personnel development.
121a.140 Private schools.
121a.141 Recovery of funds for misclassified children.
121a.142 Control of funds and property.
121a.143 Records.
121a.144 Hearing on application.
121a.145 Prohibition of commingling.
121a.146 Annual evaluation.
121a.147 State advisory panel.
121a.148 Policies and procedures for use of Part B funds.
121a.149 Description of use of Part B funds.
121a.150 Nondiscrimination and employment of handicapped individuals.
121a.151 Additional information if the State educational agency provides direct services.

LOCAL EDUCATIONAL AGENCY APPLICATIONS—GENERAL

121a.180 Submission of application.
121a.181 Responsibilities of State educational agency.
121a.182 The excess cost requirement.
121a.183 Meeting the excess cost requirement.
121a.184 Excess costs—computation of minimum amounts.
121a.185 Computation of excess costs—consolidated application.
121a.186 Excess costs—limitation on use of Part B funds.
121a.190 Consolidated applications.
121a.191 Payments under consolidated applications.
121a.192 State regulation of consolidated applications.
121a.193 State educational agency approval; disapproval.
121a.194 Withholding.

LOCAL EDUCATIONAL AGENCY APPLICATIONS—CONTENTS

121a.220 Child identification.
121a.221 Confidentiality of personally identifiable information.
121a.222 Full educational opportunity goal; timetable.
121a.223 Facilities, personnel, and services.
121a.224 Personnel development.
121a.225 Priorities.
121a.226 Parent involvement.
121a.227 Participation in regular education programs.
121a.228 Public control of funds.
121a.229 Excess cost.
121a.230 Nonsupplanting.
121a.231 Comparable services.
121a.232 Information—reports.
121a.233 Records.
121a.234 Public participation.
121a.235 Individualized educaton program.
121a.236 Local policies consistent with statute.
121a.237 Procedural safeguards.
121a.238 Use of Part B funds.
121a.239 Nondiscrimination and employment of handicapped individuals.
121a.240 Other requirements.

APPLICATION FROM SECRETARY OF INTERIOR

121a.260 Submission of annual application; approval.
121a.261 Public participation.
121a.262 Use of Part B funds.
121a.263 Applicable regulations.

PUBLIC PARTICIPATION

121a.280 Public hearings before adopting an annual program plan.
121a.281 Notice.
121a.282 Opportunity to participate; comment period.

121a.283 Review of public comments before adopting plan.
121a.284 Publication and availability of approved plan.

Subpart C—Services

FREE APPROPRIATE PUBLIC EDUCATION

121a.300 Timeliness for free appropriate public education.
121a.301 Free appropriate public education—methods and payments.
121a.302 Residential placement.
121a.303 Proper functioning of hearing aids.
121a.304 Full educational opportunity goal.
121a.305 Program options.
121a.306 Nonacademic services.
121a.307 Physical education.

PRIORITIES IN THE USE OF PART B FUNDS

121a.320 Definitions of "first priority children" and "second priority children."
121a.321 Priorities.
121a.322 First priority children—school year 1977–1978.
121a.323 Services to other children.
121a.324 Application of local educational agency to use funds for the second priority.

INDIVIDUALIZED EDUCATION PROGRAMS

121a.340 Definition.
121a.341 State educational agency responsibility.
121a.342 When individualized education programs must be in effect.
121a.343 Meetings.
121a.344 Participants in meetings.
121a.345 Parent participation.
121a.346 Content of individualized education program.
121a.347 Private school placements.
121a.348 Handicapped children in parochial or other private schools.
121a.349 Individualized education program—accountability.

DIRECT SERVICE BY THE STATE EDUCATIONAL AGENCY

121a.360 Use of local educational agency allocation for direct services.
121a.361 Nature and location of services.
121a.370 Use of State educational agency allocation for direct and support services.
121a.371 State matching.
121a.372 Applicability of nonsupplanting requirement.

COMPREHENSIVE SYSTEM OF PERSONNEL DEVELOPMENT

121a.380 Scope of system.
121a.381 Participation of other agencies and institutions.
121a.382 Inservice training.
121a.383 Personnel development plan.
121a.384 Dissemination.
121a.385 Adoption of educational practices.
121a.386 Evaluation.
121a.387 Technical assistance to local educational agencies.

Subpart D—Private Schools

HANDICAPPED CHILDREN IN PRIVATE SCHOOLS PLACED OR REFERRED BY PUBLIC AGENCIES

121a.400 Applicability of §§ 121a.401–121a.403.
121a.401 Responsibility of State educational agency.
121a.402 Implementation by State educational agency.
121a.403 Placement of children by parents.

HANDICAPPED CHILDREN IN PRIVATE SCHOOLS NOT PLACED OR REFERRED BY PUBLIC AGENCIES

121a.450 Applicability of §§ 121a.451–121a.460.
121a.451 State educational agency responsibility.
121a.452 Local educational agency responsibility.
121a.453 Determination of needs, number of children, and types of services.
121a.454 Service arrangements.
121a.455 Differences in services to private school handicapped children.
121a.456 Personnel.
121a.457 Equipment.
121a.458 Prohibition of segregation.
121a.459 Funds and property not to benefit private school.
121a.460 Existing level of instruction.

Subpart E—Procedural Safeguards

DUE PROCESS PROCEDURES FOR PARENTS AND CHILDREN

121a.500 Definitions of "consent", "evaluation", and "personally identifiable".
121a.501 General responsibility of public agencies.
121a.502 Opportunity to examine records.
121a.503 Independent educational evaluation.
121a.504 Prior notice; parent consent.
121a.505 Content of notice.
121a.506 Impartial due process hearing.
121a.507 Impartial hearing officer.
121a.508 Hearing rights.
121a.509 Hearing decision; appeal.
121a.510 Administrative appeal; impartial review.
121a.511 Civil action.
121a.512 Timeliness and convenience of hearings and reviews.
121a.513 Child's status during proceedings.
121a.514 Surrogate parents.

PROTECTION IN EVALUATION PROCEDURES

121a.530 General.
121a.531 Preplacement evaluation.
121a.532 Evaluation procedures.
121a.533 Placement procedures.
121a.534 Reevaluation.

LEAST RESTRICTIVE ENVIRONMENT

121a.550 General.
121a.551 Continuum of alternative placements.
121a.552 Placements.
121a.553 Nonacademic settings.
121a.554 Children in public or private institutions.
121a.555 Technical assistance and training activities.
121a.556 Monitoring activities.

CONFIDENTIALITY OF INFORMATION

121a.560 Definitions.
121a.561 Notice to parents.
121a.562 Access rights.
121a.563 Record of access.
121a.564 Records on more than one child.
121a.565 List of types and locations of information.
121a.566 Fees.
121a.567 Amendment of records at parent's request.
121a.568 Opportunity for a hearing.
121a.569 Result of hearing.
121a.570 Hearing procedures.
121a.571 Consent.
121a.572 Safeguards.
121a.573 Destruction of information.
121a.574 Children's rights.
121a.575 Enforcement.
121a.576 Office of Education.

OFFICE OF EDUCATION PROCEDURES

121a.580 Opportunity for a hearing.
121a.581 Hearing panel.
121a.582 Hearing procedures.
121a.583 Initial decision; final decision.
121a.589 Waiver of requirement regarding supplementing and supplanting with Part B funds.
121a.590 Withholding payments.
121a.591 Reinstating payments.
121a.592 Public notice by State and local educational agencies.
121a.593 Judicial review of Commissioner's final action on annual program plan.

Subpart F—State Administration

STATE EDUCATIONAL AGENCY RESPONSIBILITIES; GENERAL

121a.600 Responsibility for all educational programs.
121a.601 Monitoring and evaluation activities.
121a.602 Adoption of complaint procedures.

USE OF FUNDS

121a.620 Federal funds for State administration.
121a.621 Allowable costs.

STATE ADVISORY PANEL

121a.650 Establishment.
121a.651 Membership.
121a.652 Advisory panel—functions.
121a.653 Advisory panel—procedures.

Subpart G—Allocation of Funds; Reports

ALLOCATIONS

121a.700 Special definition of the term State.
121a.701 State entitlement; formula.
121a.702 Limitations and exclusions.
121a.703 Ratable reductions.
121a.704 Hold harmless provision.
121a.705 Within-State distribution: fiscal year 1978.
121a.706 Within-State distribution: fiscal year 1979 and after.
121a.707 Local educational agency entitlement; formula.
121a.708 Reallocation of local educational agency funds.
121a.709 Payments to Secretary of Interior.
121a.710 Entitlements to jurisdictions.

REPORTS

121a.750 Annual report of children served—report requirement.
121a.751 Annual report of children served—information required in the report.
121a.752 Annual report of children served—certification.
121a.753 Annual report of children served—criteria for counting children.
121a.754 Annual report of children served—other responsibilities of the State educational agency.

APPENDICES

Appendix A—Analysis of Final Regulation. (45 CFR Part 121a.) Under Part B of the Education of the Handicapped Act.

Appendix B—Index to Part 121a.

AUTHORITY: Part B of the Education of the Handicapped Act, Pub. L. 91-230, Title VI, as amended, 89 Stat. 776-794 (20 U.S.C. 1411-1420), unless otherwise noted.

Subpart A—General

PURPOSE, APPLICABILITY, AND GENERAL PROVISIONS REGULATIONS

§ 121a.1 Purpose.

The purpose of this part is:

(a) To insure that all handicapped children have available to them a free appropriate public education which in-

cludes special education and related services to meet their unique needs,

(b) To insure that the rights of handicapped children and their parents are protected,

(c) To assist States and localities to provide for the education of all handicapped children, and

(d) To assess and insure the effectiveness of efforts to educate those children.

(20 U.S.C. 1401 Note.)

§ 121a.2 Applicability to State, local, and private agencies.

(a) *States.* This part applies to each State which receives payments under Part B of the Education of the Handicapped Act.

(b) *Public agencies within the State.* The annual program plan is submitted by the State educational agency on behalf of the State as a whole. Therefore, the provisions of this part apply to all political subdivisions of the State that are involved in the education of handicapped children. These would include: (1) The State educational agency, (2) local educational agencies and intermediate educational units, (3) other State agencies and schools (such as Departments of Mental Health and Welfare and State schools for the deaf or blind), and (4) State correctional facilities.

(c) *Private schools and facilities.* Each public agency in the State is responsible for insuring that the rights and protections under this part are given to children referred to or placed in private schools and facilities by that public agency.

(See §§ 121a.400–121a.403.)

(20 U.S.C. 1412(1), (6); 1413(a); 1413(a)(4)(B).)

Comment. The requirements of this part are binding on each public agency that has direct or delegated authority to provide special education and related services in a State that receives funds under Part B of the Act, regardless of whether that agency is receiving funds under Part B.

§ 121a.3 General provisions regulations.

Assistance under Part B of the Act is subject to Parts 100, 100b, 100c, and 121 of this chapter, which include definitions and requirements relating to fiscal, administrative, property management, and other matters.

(20 U.S.C. 1417(b).)

DEFINITIONS

Comment. Definitions of terms that are used throughout these regulations are included in this subpart. Other terms are defined in the specific subparts in which they are used. Below is a list of those terms and the specific sections and subparts in which they are defined:

Consent (Section 121a.500 of Subpart E)
Destruction (Section 121a.560 of Subpart E)
Direct services (Section 121a.370(b)(1) of Subpart C)
Evaluation (Section 121a.500 of Subpart E)
First priority children (Section 121a.320(a) of Subpart C)
Independent educational evaluation (Section 121a.503 of Subpart E)
Individualized education program (Section 121a.340 of Subpart C)
Participating agency (Section 121a.560 of Subpart E)
Personally identifiable (Section 121a.500 of Subpart E)
Private school handicapped children (Section 121a.450 of Subpart D)
Public expense (Section 121a.503 of Subpart E)
Second priority children (Section 121a.320(b) of Subpart C)
Special definition of "State" (Section 121a.700 of Subpart G)
Support services (Section 121a.370(b)(2) of Subpart C)

§ 121a.4 Free appropriate public education.

As used in this part, the term "free appropriate public education" means special education and related services which:

(a) Are provided at public expense, under public supervision and direction, and without charge.

(b) Meet the standards of the State educational agency, including the requirements of this part,

(c) Include preschool, elementary school, or secondary school education in the State involved, and

(d) Are provided in conformity with an individualized education program which meets the requirements under §§ 121a.340–121a.349 of Subpart C.

(20 U.S.C. 1401(18).)

§ 121a.5 Handicapped children.

(a) As used in this part, the term "handicapped children" means those children evaluated in accordance with §§ 121a.530–121a.534 as being mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, other health impaired, deaf-blind, multi-handicapped, or as having specific learning disabilities, who because of those impairments need special education and related services.

(b) The terms used in this definition are defined as follows:

(1) "Deaf" means a hearing impairment which is so severe that the child is impaired in processing linguistic information through hearing, with or without amplification, which adversely affects educational performance.

(2) "Deaf-blind" means concomitant hearing and visual impairments, the combination of which causes such severe communication and other developmental and educational problems that they cannot be accommodated in special education programs solely for deaf or blind children.

(3) "Hard of hearing" means a hearing impairment, whether permanent or fluctuating, which adversely affects a child's educational performance but which is not included under the definition of "deaf" in this section.

(4) "Mentally retarded" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period, which adversely affects a child's educational performance.

(5) "Multihandicapped" means concomitant impairments (such as mentally retarded-blind, mentally retarded-orthopedically impaired, etc.), the combination of which causes such severe educational problems that they cannot be accommodated in special education programs solely for one of the impairments. The term does not include deaf-blind children.

(6) "Orthopedically impaired" means a severe orthopedic impairment which adversely affects a child's educational performance. The term includes impairments caused by congenital anomaly (e.g., clubfoot, absence of some member, etc.), impairments caused by disease (e.g. poliomyelitis, bone tuberculosis, etc.), and impairments from other causes (e.g., cerebral palsy, amputations, and fractures or burns which cause contractures).

(7) "Other health impaired" means limited strength, vitality or alertness, due to chronic or acute health problems such as a heart condition, tuberculosis, rheumatic fever, nephritis, asthma, sickle cell anemia, hemophilia, epilepsy, lead poisoning, leukemia, or diabetes, which adversely affects a child's educational performance.

(8) "Seriously emotionally disturbed" is defined as follows:

(i) The term means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree, which adversely affects educational performance:

(A) An inability to learn which cannot be explained by intellectual, sensory, or health factors;

(B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;

(C) Inappropriate types of behavior or feelings under normal circumstances;

(D) A general pervasive mood of unhappiness or depression; or

(E) A tendency to develop physical symptoms or fears associated with personal or school problems.

(ii) The term includes children who are schizophrenic or autistic. The term does not include children who are socially maladjusted, unless it is determined that they are seriously emotionally disturbed.

(9) "Specific learning disability" means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which may manifest itself in an imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations. The term includes such conditions as perceptual handicaps, brain injury, minimal brain disfunction, dyslexia, and developmental aphasia. The term does not include children who have learning problems which are primarily the result of visual, hearing, or motor handicaps, of mental retardation, or of environmental, cultural, or economic disadvantage.

(10) "Speech impaired" means a communication disorder, such as stuttering, impaired articulation, a language impairment, or a voice impairment, which

adversely affects a child's educational performance.

(11) "Visually handicapped" means a visual impairment which, even with correction, adversely affects a child's educational performance. The term includes both partially seeing and blind children.

(20 U.S.C. 1401(1), (15).)

§ 121a.6 Include.

As used in this part, the term "include" means that the items named are not all of the possible items that are covered, whether like or unlike the ones named.

(20 U.S.C. 1417(b).)

§ 121a.7 Intermediate educational unit.

As used in this part, the term "intermediate educational unit" means any public authority, other than a local educational agency, which:

(a) Is under the general supervision of a State educational agency;

(b) Is established by State law for the purpose of providing free public education on a regional basis; and

(c) Provides special education and related services to handicapped children within that State.

(20 U.S.C. 1401(22).)

§ 121a.8 Local educational agency.

(a) As used in this part, the term "local educational agency" means a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for public elementary or secondary schools in a city, county, township, school district, or other political subdivision of a State, or such combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary or secondary schools. Such term also includes any other public institution or agency having administrative control and direction of a public elementary or secondary school.

(b) For the purposes of this part, the term "local educational agency" also includes intermediate educational units.

(20 U.S.C. 1401(8).)

§ 121a.9 Native language.

As used in this part, the term "native language" has the meaning given that term by section 703(a)(2) of the Bilingual Education Act, which provides as follows:

The term "native language", when used with reference to a person of limited English-speaking ability, means the language normally used by that person, or in the case of a child, the language normally used by the parents of the child.

(20 U.S.C. 880b-1(a)(2); 1401(21).)

Comment. Section 602(21) of the Education of the Handicapped Act states that the term "native language" has the same meaning as the definition from the Bilingual Education Act. (The term is used in the prior notice and evaluation sections under § 121a.505(b)(2) and § 121a.532(a)(1) of Subpart E.) In using the term, the Act does not prevent the following means of communication:

(1) In all direct contact with a child (including evaluation of the child), communication would be in the language normally used by the child and not that of the parents, if there is a difference between the two.

(2) If a person is deaf or blind, or has no written language, the mode of communication would be that normally used by the person (such as sign language, braille, or oral communication).

§ 121a.10 Parent.

As used in this part, the term "parent" means a parent, a guardian, a person acting as a parent of a child, or a surrogate parent who has been appointed in accordance with § 121a.514. The term does not include the State if the child is a ward of the State.

(20 U.S.C. 1415.)

Comment. The term "parent" is defined to include persons acting in the place of a parent, such as a grandmother or stepparent with whom a child lives, as well as persons who are legally responsible for a child's welfare.

§ 121a.11 Public agency.

As used in this part, the term "public agency" includes the State educational agency, local educational agencies, intermediate educational units, and any other political subdivisions of the State which are responsible for providing education to handicapped children.

(20 U.S.C. 1412(2)(B); 1412(6); 1413(a).)

§ 121a.12 Qualified.

As used in this part, the term "qualified" means that a person has met State educational agency approved or recognized certification, licensing, registration, or other comparable requirements which apply to the area in which he or she is providing special education or related services.

(20 U.S.C. 1417(b).)

§ 121a.13 Related services.

(a) As used in this part, the term "related services" means transportation and such developmental, corrective, and other supportive services as are required to assist a handicapped child to benefit from special education, and includes speech pathology and audiology, psychological services, physical and occupational therapy, recreation, early identification and assessment of disabilities in children, counseling services, and medical services for diagnostic or evaluation purposes. The term also includes school health services, social work services in schools, and parent counseling and training.

(b) The terms used in this definition are defined as follows:

(1) "Audiology" includes:

(i) Identification of children with hearing loss;

(ii) Determination of the range, nature, and degree of hearing loss, including referral for medical or other professional attention for the habilitation of hearing;

(iii) Provision of habilitative activities, such as language habilitation, auditory training, speech reading (lip-reading), hearing evaluation, and speech conservation;

(iv) Creation and administration of programs for prevention of hearing loss;

(v) Counseling and guidance of pupils, parents, and teachers regarding hearing loss; and

(vi) Determination of the child's need for group and individual amplification, selecting and fitting an appropriate aid, and evaluating the effectiveness of amplification.

(2) "Counseling services" means services provided by qualified social workers, psychologists, guidance counselors, or other qualified personnel.

(3) "Early identification" means the implementation of a formal plan for identifying a disability as early as possible in a child's life.

(4) "Medical services" means services provided by a licensed physician to determine a child's medically related handicapping condition which results in the child's need for special education and related services.

(5) "Occupational therapy" includes:

(i) Improving, developing or restoring functions impaired or lost through illness, injury, or deprivation;

(ii) Improving ability to perform tasks for independent functioning when functions are impaired or lost; and

(iii) Preventing, through early intervention, initial or further impairment or loss of function.

(6) "Parent counseling and training" means assisting parents in understanding the special needs of their child and providing parents with information about child development.

(7) "Physical therapy" means services provided by a qualified physical therapist.

(8) "Psychological services" include:

(i) Administering psychological and educational tests, and other assessment procedures;

(ii) Interpreting assessment results;

(iii) Obtaining, integrating, and interpreting information about child behavior and conditions relating to learning.

(iv) Consulting with other staff members in planning school programs to meet the special needs of children as indicated by psychological tests, interviews, and behavioral evaluations; and

(v) Planning and managing a program of psychological services, including psychological counseling for children and parents.

(9) "Recreation" includes:

(i) Assessment of leisure function;

(ii) Therapeutic recreation services;

(iii) Recreation programs in schools and community agencies; and

(iv) Leisure education.

(10) "School health services" means services provided by a qualified school nurse or other qualified person.

(11) "Social work services in schools" include:

(i) Preparing a social or developmental history on a handicapped child;

(ii) Group and individual counseling with the child and family;

(iii) Working with those problems in a child's living situation (home, school, and community) that affect the child's adjustment in school; and

(iv) Mobilizing school and community resources to enable the child to receive maximum benefit from his or her educational program.

(12) "Speech pathology" includes:

(i) Identification of children with speech or language disorders;

(ii) Diagnosis and appraisal of specific speech or language disorders;

(iii) Referral for medical or other professional attention necessary for the habilitation of speech or language disorders;

(iv) Provisions of speech and language services for the habilitation or prevention of communicative disorders; and

(v) Counseling and guidance of parents, children, and teachers regarding speech and language disorders.

(13) "Transportation" includes:

(i) Travel to and from school and between schools,

(ii) Travel in and around school buildings, and

(iii) Specialized equipment (such as special or adapted buses, lifts, and ramps), if required to provide special transportation for a handicapped child.

(20 U.S.C. 1401(17).)

Comment. With respect to related services, the Senate Report states:

The Committee bill provides a definition of "related services," making clear that all such related services may not be required for each individual child and that such term includes early identification and assessment of handicapping conditions and the provision of services to minimize the effects of such conditions.

(Senate Report No. 94-168, p.12 (1975).)

The list of related services is not exhaustive and may include other developmental, corrective, or supportive services (such as artistic and cultural programs, and art, music, and dance therapy), if they are required to assist a handicapped child to benefit from special education.

There are certain kinds of services which might be provided by persons from varying professional backgrounds and with a variety of operational titles, depending upon requirements in individual States. For example, counseling services might be provided by social workers, psychologists, or guidance counselors; and psychological testing might be done by qualified psychological examiners, psychometrists, or psychologists, depending upon State standards.

Each related service defined under this part may include appropriate administrative and supervisory activities that are necessary for program planning, management, and evaluation.

§ 121a.14 Special education.

(a)(1) As used in this part, the term "special education" means specially designed instruction, at no cost to the parent, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions.

(2) The term includes speech pathology, or any other related service, if the service consists of specially designed instruction, at no cost to the parents, to meet the unique needs of a handicapped child, and is considered "special education" rather than a "related service" under State standards.

(3) The term also includes vocational education if it consists of specially designed instruction, at no cost to the parents, to meet the unique needs of a handicapped child.

(b) The terms in this definition are defined as follows:

(1) "At no cost" means that all specially designed instruction is provided without charge, but does not preclude incidental fees which are normally charged to non-handicapped students or their parents as a part of the regular education program.

(2) "Physical education" is defined as follows:

(i) The term means the development of:

(A) Physical and motor fitness;

(B) Fundamental motor skills and patterns; and

(C) Skills in aquatics, dance, and individual and group games and sports (including intramural and lifetime sports).

(ii) The term includes special physical education, adapted physical education, movement education, and motor development.

(20 U.S.C. 1401(16).)

(3) "Vocational education" means organized educational programs which are directly related to the preparation of individuals for paid or unpaid employment, or for additional preparation for a career requiring other than a baccalaureate or advanced degree.

(20 U.S.C. 1401(16).)

Comment. (1) The definition of "special education" is a particularly important one under these regulations, since a child is not handicapped unless he or she needs special education. (See the definition of "handicapped children" in section 121a.5.) The definition of "related services" (section 121a.13) also depends on this definition, since a related service must be necessary for a child to benefit from special education. Therefore, if a child does not need special education, there can be no "related services," and the child (because not "handicapped") is not covered under the Act.

(2) The above definition of vocational education is taken from the Vocational Education Act of 1963, as amended by Pub. L. 94-482. Under that Act, "vocational education" includes industrial arts and consumer and homemaking education programs.

§ 121a.15 State.

As used in this part, the term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virginia Islands, and the Trust Territory of the Pacific Islands.

(20 U.S.C. 1401(6).)

Subpart B—State Annual Program Plans and Local Applications

Annual Program Plans—General

§ 121a.110 Condition of assistance.

In order to receive funds under Part B of the Act for any fiscal year, a State must submit an annual program plan to the Commissioner through its State educational agency.

(20 U.S.C. 1232c(b), 1412, 1413.)

§ 121a.111 Contents of plan.

Each annual program plan must contain the provisions required in this subpart.

(20 U.S.C. 1412, 1413, 1232c(b).)

§ 121a.112 Certification by the State educational agency and attorney general.

Each annual program plan must include:

(a) A certification by the officer of the State educational agency authorized to submit the plan that:

(1) The plan has been adopted by the State educational agency, and

(2) The plan is the basis for the operation and administration of the activities to be carried out in that State under Part B of the Act; and

(b) A certification by the State Attorney General or other authorized State legal officer that:

(1) The State educational agency has authority under State law to submit the plan and to administer or to supervise the administration of the plan, and

(2) All plan provisions are consistent with State law.

(20 U.S.C. 1413(a).)

§ 121a.113 Approval; disapproval.

(a) The Commissioner shall approve any annual program plan which meets the requirements of this part and Subpart B of Part 100b of this chapter.

(b) The Commissioner shall disapprove any annual program plan which does not meet those requirements but may not finally disapprove a plan before giving reasonable notice and an opportunity for a hearing to the State educational agency.

(c) The Commissioner shall use the procedures set forth in §§ 121a.580–121a.–583 of Subpart E for a hearing under this section.

(20 U.S.C. 1413(c).)

§ 121a.114 Effective period of annual program plan.

(a) Each annual program plan is effective for a period from the date it becomes effective under § 100b.35 of this chapter through the following June 30.

(b) The Commissioner may extend the effective period of an annual program plan, on the request of a State, if the plan meets the requirements of this part and Part B of the Act.

(20 U.S.C. 1413(a), 1232c(b).)

ANNUAL PROGRAM PLANS—CONTENTS

§ 121a.120 Public participation.

(a) Each annual program plan must include procedures which insure that the requirements in §§ 121a.280–121a.284 are met.

(b) Each annual program plan must also include the following:

(1) A statement describing the methods used by the State educational agency to provide notice of the public hearings on the annual program plan. The statement must include:

(i) A copy of each news release and advertisement used to provide notice,

(ii) A list of the newspapers and other media in which the State educational agency announced or published the notice, and

(iii) The dates on which the notice was announced or published.

(2) A list of the dates and locations of the public hearings on the annual program plan.

(3) A summary of comments received by the State educational agency and a description of the modifications that the State educational agency has made in the annual program plan as a result of the comments.

(4) A statement describing the methods by which the annual program plan will be made public after its approval by the Commissioner. This statement must include the information required under paragraph (b)(1) of this section.

(20 U.S.C. 1412(7).)

§ 121a.121 Right to a free appropriate public education.

(a) Each annual program plan must include information which shows that the State has in effect a policy which insures that all handicapped children have the right to a free appropriate public education within the age ranges and timelines under § 121a.122.

(b) The information must include a copy of each State statute, court order, State Attorney General opinion, and other State document that shows the source of the policy.

(c) The information must show that the policy:

(1) Applies to all public agencies in the State;

(2) Applies to all handicapped children;

(3) Implements the priorities established under § 121a.127(a)(1) of this subpart; and

(4) Establishes timelines for implementing the policy, in accordance with § 121a.122.

(20 U.S.C. 1412(1)(2)(B), (6); 1413(a)(3).)

§ 121a.122 Timeliness and ages for free appropriate public education.

(a) *General.* Each annual program plan must include in detail the policies and procedures which the State will undertake or has undertaken in order to insure that a free appropriate public education is available for all handicapped children aged three through eighteen within the State not later than September 1, 1978, and for all handicapped children aged three through twenty-one within the State not later than September 1, 1980.

(b) *Documents relating to timelines.* Each annual program plan must include a copy of each statute, court order, attorney general decision, and other State document which demonstrates that the State has established timelines in accordance with paragraph (a) of this section.

(c) *Exception.* The requirement in paragraph (a) of this section does not apply to a State with respect to handicapped children aged three, four, five, eighteen, nineteen, twenty, or twenty-one to the extent that the requirement would be inconsistent with State law or practice, or the order of any court, respecting public education for one or more of those age groups in the State.

(d) *Documents relating to exceptions.* Each annual program plan must:

(1) Describe in detail the extent to which the exception in paragraph (c) of this section applies to the State, and

(2) Include a copy of each State law, court order, and other document which provides a basis for the exception.

(20 U.S.C. 1412(2)(B).)

§ 121a.123 Full educational opportunity goal.

Each annual program plan must include in detail the policies and procedures which the State will undertake, or has undertaken, in order to insure that the State has a goal of providing full educational opportunity to all handicapped children aged birth through twenty-one.

(20 U.S.C. 1412(2)(A).)

§ 121a.124 Full educational opportunity goal—data requirement.

Beginning with school year 1978–1979, each annual program plan must contain the following information:

(a) The estimated number of handicapped children who need special education and related services.

(b) For the current school year:

(1) The number of handicapped children aged birth through two, who are receiving special education and related services; and

(2) The number of handicapped children:

(i) Who are receiving a free appropriate public education,

(ii) Who need, but are not receiving a free appropriate public education,

(iii) Who are enrolled in public and private institutions who are receiving a free appropriate public education, and

(iv) Who are enrolled in public and private institutions and are not receiving a free appropriate public education.

(c) The estimated numbers of handicapped children who are expected to receive special education and related services during the next school year.

(d) A description of the basis used to determine the data required under this section.

(e) The data required by paragraphs (a), (b), and (c) of this section must be provided:

(1) For each disability category (except for children aged birth through two), and

(2) For each of the following age ranges: birth through two, three through five, six through seventeen, and eighteen through twenty-one.

(20 U.S.C. 1412(2)(A).)

Comment. In Part B of the Act, the term "disability" is used interchangeably with "handicapping condition". For consistency in this regulation, a child with a "disability" means a child with one of the impairments listed in the definition of "handicapped children" in § 121a.5, if the child needs special education because of the impairment. In essence, there is a continuum of impairments. When an impairment is of such a nature that the child needs special education, it is referred to as a disability, in these regulations, and the child is a "handicapped" child.

States should note that data required under this section are not to be transmitted to the Commissioner in personally identifiable form. Generally, except for such purposes as monitoring and auditing, neither the States nor the Federal Government should have to collect data under this part in personally identifiable form.

§ 121a.125 Full educational opportunity goal—timetable.

(a) *General requirement.* Each annual program plan must contain a detailed timetable for accomplishing the goal of providing full educational opportunity for all handicapped children.

(b) *Content of timetable.* (1) The timetable must indicate what percent of the total estimated number of handicapped children the State expects to have full educational opportunity in each succeeding school year.

(2) The data required under this paragraph must be provided:

(i) For each disability category (except for children aged birth through two), and

(ii) For each of the following age ranges: birth through two, three through five, six through seventeen, and eighteen through twenty-one.

(20 U.S.C. 1412(2)(A).)

§ 121a.126 Full educational opportunity goal—facilities, personnel, and services.

(a) *General requirement.* Each annual program plan must include a description of the kind and number of facilities, personnel, and services necessary throughout the State to meet the goal of providing full educational opportunity for all handicapped children. The State educational agency shall include the data required under paragraph (b) of this section and whatever additional data are necessary to meet the requirement.

(b) *Statistical description.* Each annual program plan must include the following data:

(1) The number of additional special class teachers, resource room teachers, and itinerant or consultant teachers needed for each disability category and

the number of each of these who are currently employed in the State.

(2) The number of other additional personnel needed, and the number currently employed in the State, including school psychologists, school social workers, occupational therapists, physical therapists, home-hospital teachers, speech-language pathologists, audiologists, teacher aides, vocational education teachers, work study coordinators, physical education teachers, therapeutic recreation specialists, diagnostic personnel, supervisors, and other instructional and non-instructional staff.

(3) The total number of personnel reported under paragraph (b) (1) and (2) of this section, and the salary costs of those personnel.

(4) The number and kind of facilities needed for handicapped children and the number and kind currently in use in the State, including regular classes serving handicapped children, self-contained classes on a regular school campus, resource rooms, private special education day schools, public special education day schools, private special education residential schools, public special education residential schools, hospital programs, occupational therapy facilities, physical therapy facilities, public sheltered workshops, private sheltered workshops, and other types of facilities.

(5) The total number of transportation units needed for handicapped children, the number of transportation units designed for handicapped children which are in use in the State, and the number of handicapped children who use these units to benefit from special education.

(c) *Data categories.* The data required under paragraph (b) of this section must be provided as follows:

(1) Estimates for serving all handicapped children who require special education and related services,

(2) Current year data, based on the actual numbers of handicapped children receiving special education and related services (as reported under Subpart G), and

(3) Estimates for the next school year.

(d) *Rationale.* Each annual program plan must include a description of the means used to determine the number and salary costs of personnel.

(20 U.S.C. 1412(2)(A).)

§ 121a.127 Priorities.

(a) *General requirement.* Each annual program plan must include information which shows that:

(1) The State has established priorities which meet the requirements under §§ 121a.320–121a.324 of Subpart C.

(2) The State priorities meet the timelines under § 121a.122 of this subpart, and

(3) The State has made progress in meeting those timelines.

(b) *Child data.* (1) Each annual program plan must show the number of handicapped children known by the State to be in each of the first two priority groups named in §§ 121a.321 of Subpart C:

(i) By disability category, and

(ii) By the age ranges in § 121a.124(e)(2) of this subpart.

(c) *Activities and resources.* Each annual program plan must show for each of the first two priority groups:

(1) The programs, services, and activities that are being carried out in the State,

(2) The Federal, State, and local resources that have been committed during the current school year, and

(3) The programs, services, activities, and resources that are to be provided during the next school year.

(20 U.S.C. 1412(3).)

§ 121a.128 Identification, location, and evaluation of handicapped children.

(a) *General requirement.* Each annual program plan must include in detail the policies and procedures which the State will undertake or has undertaken to insure that:

(1) All children who are handicapped, regardless of the severity of their handicap, and who are in need of special education and related services are identified, located, and evaluated; and

(2) A practical method is developed and implemented to determine which children are currently receiving needed special education and related services and which children are not currently receiving needed special education and related services.

(b) *Information.* Each annual program plan must:

(1) Designate the State agency (if other than the State educational agency) responsible for coordinating the planning and implementation of the policies and procedures under paragraph (a) of this section;

(2) Name each agency that participates in the planning and implementation and describe the nature and extent of its participation;

(3) Describe the extent to which:

(i) The activities described in paragraph (a) of this section have been achieved under the current annual program plan, and

(ii) The resources named for these activities in that plan have been used;

(4) Describe each type of activity to be carried out during the next school year, including the role of the agency named under paragraph (b)(1) of this section, timelines for completing those activities, resources that will be used, and expected outcomes;

(5) Describe how the policies and procedures under paragraph (a) of this section will be monitored to insure that the State educational agency obtains:

(i) The number of handicapped children within each disability category that have been identified, located, and evaluated, and

(ii) Information adequate to evaluate the effectiveness of those policies and procedures; and

(6) Describe the method the State uses to determine which children are currently receiving special education and related services and which children are not receiving special education and related services.

(20 U.S.C. 1412(2)(C).)

Comment. The State is responsible for insuring that all handicapped children are identified, located, and evaluated, including children in all public and private agencies and institutions in the State. Collection and use of data are subject to the confidentiality requirements in §§ 121a.560–121a.576.

§ 121a.129 Confidentiality of personally identifiable information.

(a) Each annual program plan must include in detail the policies and procedures which the State will undertake or has undertaken in order to insure the protection of the confidentiality of any personally identifiable information collected, used, or maintained under this part.

(b) The Commissioner shall use the criteria in §§ 121a.560–121a.576 of Subpart E to evaluate the policies and procedures of the State under paragraph (a) of this section.

(20 U.S.C. 1412(2)(D); 1417(c).)

Comment. The confidentiality regulations were published in the FEDERAL REGISTER in final form on February 27, 1976 (41 FR 8603–8610), and met the requirements of Part B of the Act, as amended by Pub. L. 94–142. Those regulations are incorporated in § 121a.560–121a.576 of Subpart E.

§ 121a.130 Individualized education programs.

(a) Each annual program plan must include information which shows that each public agency in the State maintains records of the individualized education program for each handicapped child, and each public agency establishes, reviews, and revises each program as provided in Subpart C.

(b) Each annual program plan must include:

(1) A copy of each State statute, policy, and standard that regulates the manner in which individualized education programs are developed, implemented, reviewed, and revised, and

(2) The procedures which the State educational agency follows in monitoring and evaluating those programs.

(20 U.S.C. 1412(4).)

§ 121a.131 Procedural safeguards.

Each annual program plan must include procedural safeguards which insure that the requirements in §§ 121a.500–121a.514 of Subpart E are met.

(20 U.S.C. 1412(5)(A).)

§ 121a.132 Least restrictive environment.

(a) Each annual program plan must include procedures which insure that the requirements in §§ 121a.550–121a.556 of Subpart E are met.

(b) Each annual program plan must include the following information:

(1) The number of handicapped children in the State, within each disability category, who are participating in regular education programs, consistent with §§ 121a.550–121a.556 of Subpart E.

(2) The number of handicapped children who are in separate classes or separate school facilities, or who are otherwise removed from the regular education environment.

(20 U.S.C. 1412(5)(B).)

§ 121a.133 Protection in evaluation procedures.

Each annual program plan must include procedures which insure that the requirements in §§ 121a.530–121a.534 of Subpart E are met.

(10 U.S.C. 1412(5)(C).)

§ 121a.134 Responsibility of State educational agency for all educational programs.

(a) Each annual program plan must include information which shows that the requirements in § 121a.600 of Subpart F are met.

(b) The information under paragraph (a) of this section must include a copy of each State statute, State regulation, signed agreement between respective agency officials, and any other document that shows compliance with that paragraph.

(20 U.S.C. 1412(6).)

§ 121a.135 Monitoring procedures.

Each annual program plan must include information which shows that the requirements in § 121a.601 and § 121a.602 of Subpart F are met.

(20 U.S.C. 1412(6).)

§ 121a.136 Implementation procedures—State educational agency.

Each annual program plan must describe the procedures the State educational agency follows to inform each public agency of its responsibility for insuring effective implementation of procedural safeguards for the handicapped children served by that public agency.

(20 U.S.C. 1412(6).)

§ 121a.137 Procedures for consultation.

Each annual program plan must include an assurance that in carrying out the requirements of section 612 of the Act, procedures are established for consultation with individuals involved in or concerned with the education of handicapped children, including handicapped individuals and parents of handicapped children.

(20 U.S.C. 1412(7)(A).)

§ 121a.138 Other Federal programs.

Each annual program plan must provide that programs and procedures are established to insure that funds received by the State or any public agency in the State under any other Federal program, including section 121 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 241e–2), section 305(b)(8) of that Act (20 U.S.C. 844a(b)(8)) or Title IV–C of that Act (20 U.S.C. 1831), and section 110(a) of the Vocational Education Act of 1963, under which there is specific authority for assistance for the education of handicapped children, are used by the State, or any public agency in the State, only in a manner consistent with the goal of providing free appropriate public education for all handicapped children, except that nothing in this section limits the specific requirements of the laws governing those Federal programs.

(20 U.S.C. 1413(a)(2).)

§ 121a.139 Comprehensive system of personnel development.

Each annual program plan must include the material required under §§ 121a.380–121a.387 of Subpart C.

(20 U.S.C. 1413(a)(3).)

§ 121a.140 Private schools.

Each annual program plan must include policies and procedures which insure that the requirements of Subpart D are met.

(20 U.S.C. 1413(a)(4).)

§ 121a.141 Recovery of funds for misclassified children.

Each annual program plan must include policies and procedures which insure that the State seeks to recover any funds provided under Part B of the Act for services to a child who is determined to be erroneously classified as eligible to be counted under section 611(a) or (d) of the Act.

(20 U.S.C. 1413(a)(5).)

§ 121a.142 Control of funds and property.

Each annual program plan must provide assurance satisfactory to the Commissioner that the control of funds provided under Part B of the Act, and title to property acquired with those funds, is in a public agency for the uses and purposes provided in this part, and that a public agency administers the funds and property.

(20 U.S.C. 1413(a)(6).)

§ 121a.143 Records.

Each annual program plan must provide for keeping records and affording access to those records, as the Commissioner may find necessary to assure the correctness and verification of reports and of proper disbursement of funds provided under Part B of the Act.

(20 U.S.C. 1413(a)(7)(B).)

§ 121a.144 Hearing on application.

Each annual program plan must include procedures to insure that the State educational agency does not take any final action with respect to an application submitted by a local educational agency before giving the local educational agency reasonable notice and an opportunity for a hearing.

(20 U.S.C. 1413(a)(8).)

§ 121a.145 Prohibition of commingling.

Each annual program plan must provide assurance satisfactory to the Commissioner that funds provided under Part B of the Act are not commingled with State funds.

(20 U.S.C. 1413(a)(9).)

Comment. This assurance is satisfied by the use of a separate accounting system that includes an "audit trail" of the expenditure of the Part B funds. Separate bank accounts are not required. (See 45 CFR 100b, Subpart F (Cash Depositories).)

§ 121a.146 Annual evaluation.

Each annual program plan must include procedures for evaluation at least annually of the effectiveness of programs in meeting the educational needs of handicapped children, including evaluation of individualized education programs.

(20 U.S.C. 1413(a)(11).)

§ 121a.147 State advisory panel.

Each annual program plan must provide that the requirements of §§ 121a.650–121a.653 of Subpart F are met.

(20 U.S.C. 1413(a)(12).)

§ 121a.148 Policies and procedures for use of Part B funds.

Each annual program plan must set forth policies and procedures designed to insure that funds paid to the State under Part B of the Act are spent in accordance with the provisions of Part B, with particular attention given to sections 611(b), 611(c), 611(d), 612(2), and 612(3) of the Act.

(20 U.S.C. 1413(a)(1).)

§ 121a.149 Description of use of Part B funds.

(a) *State allocation.* Each annual program plan must include the following information about the State's use of funds under § 121a.370 of Subpart C and § 121a.620 of Subpart F:

(1) A list of administrative positions, and a description of duties for each person whose salary is paid in whole or in part with those funds.

(2) For each position, the percentage of salary paid with those funds.

(3) A description of each administrative activity the State educational agency will carry out during the next school year with those funds.

(4) A description of each direct service and each support service which the State educational agency will provide during the next school year with those funds, and the activities the State advisory panel will undertake during that period with those funds.

(b) *Local educational agency allocation.* Each annual program plan must include:

(1) An estimate of the number and percent of local educational agencies in the State which will receive an allocation under this part (other than local educational agencies which submit a consolidated application),

(2) An estimate of the number of local educational agencies which will receive an allocation under a consolidated application,

(3) An estimate of the number of consolidated applications and the average number of local educational agencies per application, and

(4) A description of direct services the State educational agency will provide under § 121a.360 of Subpart C.

(20 U.S.C. 1232c(b)(1)(B)(ii).)

§ 121a.150 Nondiscrimination and employment of handicapped individuals.

(a) Each annual program plan must include an assurance that the program assisted under Part B of the Act will be operated in compliance with Title 45 of the Code of Federal Regulations Part 84 (Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving or Benefitting from Federal Financial Assistance). The State educational agency may incorporate this assurance by reference if it has already been filed with the Department of Health, Education, and Welfare.

(b) The assurance under paragraph (a) of this section covers, among other things, the specific requirement on employment of handicapped individuals under section 606 of the Act, which states:

The Secretary shall assure that each recipient of assistance under this Act shall make positive efforts to employ and advance in employment qualified handicapped individuals in programs assisted under this Act.

(20 U.S.C. 1405; 29 U.S.C. 794.)

§ 121a.151 Additional information if the State educational agency provides direct services.

If a State educational agency provides free appropriate public education for handicapped children or provides them with direct services, its annual program plan must include the information required under §§ 121a.226–121a.228, 121a.231, and 121a.235.

(20 U.S.C. 1413(b).)

LOCAL EDUCATIONAL AGENCY APPLICATIONS—GENERAL

§ 121a.180 Submission of application.

In order to receive payments under Part B of the Act for any fiscal year a local educational agency must submit an application to the State educational agency.

(20 U.S.C. 1414(a).)

§ 121a.181 Responsibilities of State educational agency.

Each State educational agency shall establish the procedures and format which a local educational agency uses in preparing and submitting its application.

(20 U.S.C. 1414(a))

§ 121a.182 The excess cost requirement.

A local educational agency may only use funds under Part B of the Act for the excess costs of providing special education and related services for handicapped children.

(20 U.S.C. 1414(a)(1), (a)(2)(B)(i).)

§ 121a.183 Meeting the excess cost requirement.

(a) A local educational agency meets the excess cost requirement if it has on the average spent at least the amount determined under § 121a.184 for the education of each of its handicapped children. This amount may not include capital outlay or debt service.

(b) Each local educational agency must keep records adequate to show that it has met the excess cost requirement.

(20 U.S.C. 1402(20); 1414(a)(1).)

Comment. The excess cost requirement means that the local educational agency must spend a certain minimum amount for the education of its handicapped children before Part B funds are used. This insures that children served with Part B funds have at least the same average amount spent on them, from sources other than Part B, as do the children in the school district taken as a whole.

The minimum amount that must be spent for the education of handicapped children is computed under a statutory formula. Section 121a.184 implements this formula and gives a step-by-step method to determine the minimum amount. Excess costs are those costs of special education and related services which exceed the minimum amount. Therefore, if a local educational agency can show that it has (on the average) spent the minimum amount for the education of each of its handicapped children, it has met the excess cost requirement, and all additional costs are excess costs. Part B funds can then be used to pay for these additional costs, subject to the other requirements of Part B (priorities, etc.). In the "Comment" under section 121a.184, there is an example of how the minimum amount is computed.

§ 121a.184 Excess costs—computation of minimum amount.

The minimum average amount a local educational agency must spend under § 121a.183 for the education of each of its handicapped children is computed as follows:

(a) Add all expenditures of the local educational agency in the preceding school year, except capital outlay and debt service:

(1) For elementary school students, if the handicapped child is an elementary school student, or

(2) For secondary school students, if the handicapped child is a secondary school student.

(b) From this amount, subtract the total of the following amounts spent for elementary school students or for secondary school students, as the case may be:

(1) Amounts the agency spent in the preceding school year from funds awarded under Part B of the Act and Titles I and VII of the Elementary and Secondary Education Act of 1965, and

(2) Amounts from State and local funds which the agency spent in the preceding school year for:

(i) Programs for handicapped children,

(ii) Programs to meet the special educational needs of educationally deprived children, and

(iii) Programs of bilingual education for children with limited English-speaking ability.

(c) Divide the result under paragraph (b) of this section by the average number of students enrolled in the agency in the preceding school year:

(1) In its elementary schools, if the handicapped child is an elementary school student, or

(2) In its secondary schools, if the handicapped child is a secondary school student.

(20 U.S.C. 1414(a)(1).)

Comment. The following is an example of how a local educational agency might compute the average minimum amount it must spend for the education of each of its handicapped children, under § 121a.183. This example follows the formula in § 121a.184. Under the statute and regulations, the local educational agency must make one computation for handicapped children in its elementary schools and a separate computation for handicapped children in its secondary schools. The computation for handicapped elementary school students would be done as follows:

a. First, the local educational agency must determine its total amount of expenditures for elementary school students from all sources—local, State, and Federal (including Part B)—in the preceding school year. Only capital outlay and debt service are excluded.

Example: A local educational agency spent the following amounts last year for elementary school students (including its handicapped elementary school students):

(1) From local tax funds	$2,750,000
(2) From State funds	7,000,000
(3) From Federal funds	750,000
	10,500,000

Of this total, $500,000 was for capital outlay and debt service relating to the education of elementary school students. This must be subtracted from total expenditures:

	$10,500,000
	−500,000
Total expenditures for elementary school students (less capital outlay and debt service)	=10,000,000

b. Next, the local educational agency must subtract amounts spent for:

(1) Programs for handicapped children;

(2) Programs to meet the special educational needs of educationally deprived children; and

(3) Programs of bilingual education for children with limited English-speaking ability.

These are funds which the local educational agency actually spent, not funds received last year but carried over for the current school year.

Example: The local educational agency spent the following amounts for elementary school students last year:

(1) From funds under Title I of the Elementary and Secondary Education Act of 1965	$300,000
(2) From a special State program for educationally deprived children	200,000
(3) From a grant under Part B	200,000
(4) From State funds for the education of handicapped children	500,000

(5) From a locally-funded program for handicapped children	$250,000
(6) From a grant for a bilingual education program under Title VII of the Elementary and Secondary Education Act of 1965	150,000
Total	1,600,000

(A local educational agency would also include any other funds it spent from Federal, State, or local sources for the three basic purposes: handicapped children, educationally deprived children, and bilingual education for children with limited English-speaking ability.)

This amount is subtracted from the local educational agency's total expenditure for elementary school students computed above:

$10,000,000
−1,600,000
8,400,000

c. The local educational agency next must divide by the average number of students enrolled in the elementary schools of the agency last year (including its handicapped students).

Example: Last year, an average of 7,000 students were enrolled in the agency's elementary schools. This must be divided into the amount computed under the above paragraph:

$8,400,000 / 7,000 students = $1,200/student

This figure is in the minimum amount the local educational agency must spend (on the average) for the education of each of its handicapped students. Funds under Part B may be used only for costs over and above this minimum. In this example, if the local educational agency has 100 handicapped elementary school students, it must keep records adequate to show that it has spent at least $120,000 for the education of those students (100 students times $1,200/student), not including capital outlay and debt service.

This $120,000 may come from any funds except funds under Part B, subject to any legal requirements that govern the use of those other funds.

If the local educational agency has handicapped secondary school students, it must do the same computation for them. However, the amounts used in the computation would be those the local educational agency spent last year for the education of secondary school students, rather than for elementary school students.

§ 121a.185 Computation of excess costs—consolidated application.

The minimum average amount under § 121a.183 where two or more local educational agencies submit a consolidated application, is the average of the combined minimum average amounts determined under § 121a.184 in those agencies for elementary or secondary school students, as the case may be.

(20 U.S.C. 1414(a)(1).)

§ 121a.186 Excess costs—limitation on use of Part B funds.

(a) The excess cost requirement prevents a local educational agency from using funds provided under Part B of the Act to pay for all of the costs directly attributable to the education of a handicapped child, subject to paragraph (b) of this section.

(b) The excess cost requirement does not prevent a local educational agency from using Part B funds to pay for all of the costs directly attributable to the education of a handicapped child in any of the age ranges three, four, five, eighteen, nineteen, twenty, or twenty-one, if no local or State funds are available for non-handicapped children in that age range. However, the local educational agency must comply with the nonsupplanting and other requirements of this part in providing the education and services.

(20 U.S.C. 1402(20); 1414(a)(1).)

§ 121a.190 Consolidated applications.

(a) *Voluntary applications.* Local educational agencies may submit a consolidated application for payments under Part B of the Act.

(b) *Required applications.* A State educational agency may require local educational agencies to submit a consolidated application for payments under Part B of the Act if the State educational agency determines that an individual application submitted by a local educational agency will be disapproved because:

(1) The agency's entitlement is less than the $7,500 minimum required by section 611(c)(4)(A)(i) of the Act (§ 121a.360(a)(1) of Subpart C); or

(2) The agency is unable to establish and maintain programs of sufficient size and scope to effectively meet the educational needs of handicapped children.

(c) *Size and scope of program.* The State educational agency shall establish standards and procedures for determinations under paragraph (b)(2) of this section.

(20 U.S.C. 1414(c)(1).)

§ 121a.191 Payments under consolidated applications.

In any case in which a consolidated application is approved by the State educational agency, the payments to the participating local educational agencies must be equal to the sum of the entitlements of the separate local educational agencies.

(20 U.S.C. 1414(c)(2)(A).)

§ 121a.192 State regulation of consolidated applications.

(a) The State educational agency shall issue regulations with respect to consolidated applications submitted under this part.

(b) The State educational agency's regulations must:

(1) Be consistent with section 612(1)–(7) and section 613(a) of the Act, and

(2) Provide participating local educational agencies with joint responsibilities for implementing programs receiving payments under this part.

(20 U.S.C. 1414(c)(2)(B).)

(c) If an intermediate educational unit is required under State law to carry out this part, the joint responsibilities given to local educational agencies under paragraph (b)(2) of this section do not apply to the administration and disbursement of any payments received by the intermediate educational unit. Those administrative responsibilities must be carried out exclusively by the intermediate educational unit.

(20 U.S.C. 1414(c)(2)(C).)

§ 121a.193 State educational agency approval; disapproval.

(a) *Approval.* A State educational agency shall approve an application submitted by a local educational agency if the State educational agency determines that the application meets the requirements under §§ 121a.220–121a.240. However, the State educational agency may not approve any application until the Commissioner approves its annual program plan for the school year covered by the application.

(b) *Disapproval.* The State educational agency shall disapprove an application if the State educational agency determines that the application does not meet a requirement under §§ 121a.220–121a.240.

(20 U.S.C. 1414(b)(1).)

(c) In carrying out its functions under this section, each State educational agency shall consider any decision resulting from a hearing under §§ 121a.506–121a.513 of Subpart E which is adverse to the local educational agency involved in the decision.

(20 U.S.C. 1414(b)(3).)

§ 121a.194 Withholding.

(a) If a State educational agency, after giving reasonable notice and an opportunity for a hearing to a local educational agency, decides that the local educational agency in the administration of an application approved by the State educational agency has failed to comply with any requirement in the application, the State educational agency, after giving notice to the local educational agency, shall:

(1) Make no further payments to the local educational agency until the State educational agency is satisfied that there is no longer any failure to comply with the requirement; or

(2) Consider its decision in its review of any application made by the local educational agency under § 121a.180;

(3) Or both.

(b) Any local educational agency receiving a notice from a State educational agency under paragraph (a) of this section is subject to the public notice provision in § 121a.592.

(20 U.S.C. 1414(b)(2).)

Local Educational Agency Applications—Contents

§ 121a.220 Child identification.

Each application must include procedures which insure that all children residing within the jurisdiction of the local educational agency who are handicapped, regardless of the severity of their handicap, and who are in need of special education and related services are identified, located, and evaluated, including a practical method of determining which children are currently receiving needed

special education and related services and which children are not currently receiving needed special education and related services.

(20 U.S.C. 1414(a)(1)(A).)

Comment. The local educational agency is responsible for insuring that all handicapped children within its jurisdiction are identified, located, and evaluated, including children in all public and private agencies and institutions within that jurisdiction. Collection and use of data are subject to the confidentiality requirements in §§ 121a.560–121a.576 of Subpart E.

§ 121a.221 Confidentiality of personally identifiable information.

Each application must include policies and procedures which insure that the criteria in §§ 121a.560–121a.574 of Subpart E are met.

(20 U.S.C. 1414(a)(1)(B).)

§ 121a.222 Full educational opportunity goal; timetable.

Each application must: (a) Include a goal of providing full educational opportunity to all handicapped children, aged birth through 21, and

(b) Include a detailed timetable for accomplishing the goal.

(20 U.S.C. 1414(a)(1)(C), (D).)

§ 121a.223 Facilities, personnel, and services.

Each application must provide a description of the kind and number of facilities, personnel, and services necessary to meet the goal in § 121a.222.

(20 U.S.C. 1414(a)(1)(E).)

§ 121a.224 Personnel development.

Each application must include procedures for the implementation and use of the comprehensive system of personnel development established by the State educational agency under § 121a.140.

(20 U.S.C. 1414(a)(1)(C)(i).)

§ 121a.225 Priorities.

Each application must include priorities which meet the requirements of §§ 121a.320–121a.324.

(20 U.S.C. 1414(a)(1)(C)(ii).)

§ 121a.226 Parent involvement.

Each application must include procedures to insure that, in meeting the goal under § 121a.222, the local educational agency makes provision for participation of and consultation with parents or guardians of handicapped children.

(20 U.S.C. 1414(a)(1)(C)(iii).)

§ 121a.227 Participation in regular education programs.

(a) Each application must include procedures to insure that to the maximum extent practicable, and consistent with §§ 121a.550–121a.553 of Subpart E, the local educational agency provides special services to enable handicapped children to participate in regular educational programs.

(b) Each application must describe:

(1) The types of alternative placements that are available for handicapped children, and

(2) The number of handicapped children within each disability category who are served in each type of placement.

(20 U.S.C. 1414(a)(1)(C)(iv).)

§ 121a.228 Public control of funds.

Each application must provide assurance satisfactory to the State educational agency that control of funds provided under Part B of the Act and title to property acquired with those funds, is in a public agency for the uses and purposes under this part, and that a public agency administers the funds and property.

(20 U.S.C. 1414(a)(2)(A).)

§ 121a.229 Excess cost.

Each application must provide assurance satisfactory to the State educational agency that the local educational agency uses funds provided under Part B of the Act only for costs which exceed the amount computed under § 121a.184 and which are directly attributable to the education of handicapped children.

(20 U.S.C. 1414(a)(2)(B).)

§ 121a.230 Nonsupplanting.

(a) Each application must provide assurance satisfactory to the State educational agency that the local educational agency uses funds provided under Part B of the Act to supplement and, to the extent practicable, increase the level of State and local funds expended for the education of handicapped children, and in no case to supplant those State and local funds.

(b) To meet the requirement in paragraph (a) of this section:

(1) The total amount or average per capita amount of State and local school funds budgeted by the local educational agency for expenditures in the current fiscal year for the education of handicapped children must be at least equal to the total amount or average per capita amount of State and local school funds actually expended for the education of handicapped children in the most recent preceding fiscal year for which the information is available. Allowance may be made for:

(i) Decreases in enrollment of handicapped children; and

(ii) Unusually large amounts of funds expended for such long-term purposes as the acquisition of equipment and the construction of school facilities; and

(2) The local educational agency must not use Part B funds to displace State or local funds for any particular cost.

(20 U.S.C. 1414(a)(2)(B).)

Comment. Under statutes such as Title I of the Elementary and Secondary Education Act of 1965, as amended, the requirement is to not supplant funds that "would" have been expended if the Federal funds were not available. The requirement under Part B, however, is to not supplant funds which have been "expended." This use of the past tense suggests that the funds referred to are those which the State or local agency actually spent at some time before the use of the Part B funds. Therefore, in judging compliance with this requirement, the Commissioner looks to see if Part B funds are used for any costs which were previously paid for with State or local funds.

The nonsupplanting requirement prohibits a local educational agency from supplanting State and local funds with Part B funds on either an aggregate basis or for a given expenditure. This means that if an LEA spent $100,000 for special education in FY 1977, it must budget at least $100,000 in FY 1978, unless one of the conditions in § 121a.230 (b)(1) applies.

Whether a local educational agency supplants with respect to a particular cost would depend on the circumstances of the expenditure. For example, if a teacher's salary has been switched from local funding to Part B funding, this would appear to be supplanting. However, if that teacher was taking over a different position (such as a resource room teacher, for example), it would not be supplanting. Moreover, it might be important to consider whether the particular action of a local educational agency led to an increase in services for handicapped children over that which previously existed. The intent of the requirement is to insure that Part B funds are used to increase State and local efforts and are not used to take their place. Compliance would be judged with this aim in mind. The supplanting requirement is not intended to inhibit better services to handicapped children.

§ 121a.231 Comparable services.

(a) Each application must provide assurance satisfactory to the State educational agency that the local educational agency meets the requirements of this section.

(b) A local educational agency may not use funds under Part B of the Act to provide services to handicapped children unless the agency uses State and local funds to provide services to those children which, taken as a whole, are at least comparable to services provided to other handicapped children in that local educational agency.

(c) Each local educational agency shall maintain records which show that the agency meets the requirement in paragraph (b) of this section.

(20 U.S.C. 1414(a)(2)(C).)

Comment. Under the "comparability" requirement, if State and local funds are used to provide certain services, those services must be provided with State and local funds to all handicapped children in the local educational agency who need them. Part B funds may then be used to supplement existing services, or to provide additional services to meet special needs. This, of course, is subject to the other requirements of the Act, including the priorities under §§ 121a.320–121a.324.

§ 121a.232 Information—reports.

Each application must provide that the local educational agency furnishes information (which, in the case of reports relating to performance, is in accordance with specific performance criteria developed by the local educational agency and related to program objectives) as may be necessary to enable the State educational

agency to perform its duties under this part, including information relating to the educational achievement of handicapped children participating in the local educational agency's programs for handicapped children.

(20 U.S.C. 1414(a)(3)(A).)

§ 121a.233 Records.

Each application must provide that the local educational agency keeps such records, and affords access to those records, as the State educational agency may find necessary to insure the correctness and verification of the information that the local educational agency furnishes under § 121a.232.

(20 U.S.C. 1414(a)(3)(B).)

§ 121a.234 Public participation.

(a) Each application must:

(1) Provide for making the application and all documents related to the application available to parents and the general public; and

(2) Provide that all evaluations and reports required under § 121a.232 are public information.

(b) In implementing the requirement in paragraph (a)(1), the local educational agency shall use methods for public participation within its jurisdiction which are comparable to those required in § 121a.280–121a.284 of this subpart. However, the local educational agency is not required to hold public hearings.

(20 U.S.C. 1414(a)(4).)

§ 121a.235 Individualized education program.

Each application must include procedures to assure that the local educational agency complies with §§ 121a.340–121a.349 of Subpart C.

(20 U.S.C. 1414(a)(5).)

§ 121a.236 Local policies consistent with statute.

Each application must provide assurance satisfactory to the State educational agency that all policies and programs which the local educational agency establishes and administers are consistent with section 612(1)–(7) and section 613(a) of the Act.

(20 U.S.C. 1414(a)(6).)

§ 121a.237 Procedural safeguards.

Each application must provide assurance satisfactory to the State educational agency that the local educational agency has procedural safeguards which meet the requirements of §§ 121a.500–121a.514 of Subpart E.

(20 U.S.C. 1414(a)(7).)

§ 121a.238 Use of Part B funds.

Each application must describe how the local educational agency will use the funds under Part B of the Act during the next school year.

(20 U.S.C. 1414(a).)

§ 121a.239 Nondiscrimination and employment of handicapped individuals.

(a) Each application must include an assurance that the program assisted under Part B of the Act will be operated in compliance with Title 45 of the Code of Federal Regulations Part 84 (Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving or Benefitting from Federal Financial Assistance). The local educational agency may incorporate this assurance by reference if it has already been filed with the Department of Health, Education, and Welfare.

(b) The assurance under paragraph (a) of this section covers, among other things, the specific requirement on employment of handicapped individuals under section 606 of the Act, which states:

> The Secretary shall assure that each recipient of assistance under this Act shall make positive efforts to employ and advance in employment qualified handicapped individuals in programs assisted under this Act.

(20 U.S.C. 1405; 29 U.S.C. 794.)

§ 121a.240 Other requirements.

Each local application must include additional procedures and information which the State educational agency may require in order to meet the State annual program plan requirements under §§ 121a.120–121a.151.

(20 U.S.C. 1414(a)(6).)

APPLICATION FROM SECERTARY OF INTERIOR

§ 121a.260 Submission of annual application; approval.

In order to receive payments under this part, the Secretary of Interior shall submit an annual application which:

(a) Meets applicable requirements of section 614(a) of the Act;

(b) Includes monitoring procedures which are consistent with § 121a.601; and

(c) Includes other material as agreed to by the Commissioner and the Secretary of Interior.

(20 U.S.C. 1411(f).)

§ 121a.261 Public participation.

In the development of the application for the Department of Interior, the Secretary of Interior shall provide for public participation consistent with §§ 121a.280–121a.284.

(20 U.S.C. 1411(f).)

§ 121a.262 Use of Part B funds.

(a) The Department of Interior may use five percent of its payments in any fiscal year, or $200,000, whichever is greater, for administrative costs in carrying out the provisions of this Part.

(b) The remainder of the payments to the Secretary of Interior in any fiscal year must be used in accordance with the priorities under §§ 121a.320–121a.324 of Subpart C.

(20 U.S.C. 1411(f).)

§ 121a.263 Applicable regulations.

The Secretary of Interior shall comply with the requirements under Subparts C, E, and F.

(20 U.S.C. 1411(f)(2).)

PUBLIC PARTICIPATION

§ 121a.280 Public hearings before adopting an annual program plan.

(a) Prior to its adoption of an annual program plan, the State educational agency shall:

(1) Make the plan available to the general public,

(2) Hold public hearings, and

(3) Provide an opportunity for comment by the general public on the plan.

(20 U.S.C. 1412(7).)

§ 121a.281 Notice.

(a) The State educational agency shall provide notice to the general public of the public hearings.

(b) The notice must be in sufficient detail to inform the public about:

(1) The purpose and scope of the annual program plan and its relation to Part B of the Education of the Handicapped Act,

(2) The availability of the annual program plan,

(3) The date, time, and location of each public hearing,

(4) The procedures for submitting written comments about the plan, and

(5) The timetable for developing the final plan and submitting it to the Commissioner for approval.

(c) The notice must be published or announced:

(1) In newspapers or other media, or both, with circulation adequate to notify the general public about the hearings, and (2) Enough in advance of the date of the hearings to afford interested parties throughout the State a reasonable opportunity to participate.

(20 U.S.C. 1412(7).)

§ 121a.282 Opportunity to participate; comment period.

(a) The State educational agency shall conduct the public hearings at times and places that afford interested parties throughout the State a reasonable opportunity to participate.

(b) The plan must be available for comment for a period of at least 30 days following the date of the notice under § 121a.281.

(20 U.S.C. 1412(7).)

§ 121a.283 Review of public comments before adopting plan.

Before adopting its annual program plan, the State educational agency shall:

(a) Review and consider all public comments, and

(b) Make any necessary modifications in the plan.

(20 U.S.C. 1412(7).)

§ 121a.284 Publication and availability of approved plan.

After the Commissioner approves an annual program plan, the State educational agency shall give notice in newspapers or other media, or both, that the plan is approved. The notice must name places throughout the State where the plan is available for access by any interested person.

(20 U.S.C. 1412(7).)

Subpart C—Services

Free Appropriate Public Education

§ 121a.300 Timelines for free appropriate public education.

(a) *General.* Each State shall insure that free appropriate public education is available to all handicapped children aged three through eighteen within the State not later than September 1, 1978, and to all handicapped children aged three through twenty-one within the State not later than September 1, 1980.

(b) *Age ranges 3–5 and 18–21.* This paragraph provides rules for applying the requirement in paragraph (a) of this section to handicapped children aged three, four, five, eighteen, nineteen, twenty, and twenty-one:

(1) If State law or a court order requires the State to provide education for handicapped children in any disability category in any of these age groups, the State must make a free appropriate public education available to all handicapped children of the same age who have that disability.

(2) If a public agency provides education to non-handicapped children in any of these age groups, it must make a free appropriate public education available to at least a proportionate number of handicapped children of the same age.

(3) If a public agency provides education to 50 percent or more of its handicapped children in any disability category in any of these age groups, it must make a free appropriate public education available to all of its handicapped children of the same age who have that disability.

(4) If a public agency provides education to a handicapped child in any of these age groups, it must make a free appropriate public education available to that child and provide that child and his or her parents all of the rights under Part B of the Act and this part.

(5) A State is not required to make a free appropriate public education available to a handicapped child in one of these age groups if:

(i) State law expressly prohibits, or does not authorize, the expenditure of public funds to provide education to non-handicapped children in that age group; or

(ii) The requirement is inconsistent with a court order which governs the provision of free public education to handicapped children in that State.

(20 U.S.C. 1412(2)(B); Sen. Rept. No. 94-168 p. 19 (1975).)

Comment. 1. The requirement to make free appropriate public education available applies to all handicapped children within the State who are in the age ranges required under section 121a.300 and who need special education and related services. This includes handicapped children already in school and children with less severe handicaps, who are not covered under the priorities under § 121a.321.

2. In order to be in compliance with § 121a.300, each State must insure that the requirement to identify, locate, and evaluate all handicapped children is fully implemented by public agencies throughout the State. This means that before September 1, 1978, every child who has been referred or is on a waiting list for evaluation (including children in school as well as those not receiving an education) must be evaluated in accordance with §§ 121a.530–121a.533 of Subpart E. If, as a result of the evaluation, it is determined that a child needs special education and related services, an individualized education program must be developed for the child by September 1, 1978, and all other applicable requirements of this part must be met.

3. The requirement to identify, locate, and evaluate handicapped children (commonly referred to as the "child find system") was enacted on August 21, 1974, under Pub. L. 93-380. While each State needed time to establish and implement its child find system, the four year period between August 21, 1974, and September 1, 1978, is considered to be sufficient to insure that the system is fully operational and effective on a State-wide basis.

Under the statute, the age range for the child find requirement (0–21) is greater than the mandated age range for providing free appropriate public education (FAPE). One reason for the broader age requirement under "child find" is to enable States to be aware of and plan for younger children who will require special education and related services. It also ties in with the full educational opportunity goal requirement, which has the same age range as child find. Moreover, while a State is not required to provide "FAPE" to handicapped children below the age ranges mandated under § 121a.300, the State may, at its discretion, extend services to those children, subject to the requirements on priorities under §§ 121a.320–121a.324.

§ 121a.301 Free appropriate public education—methods and payments.

(a) Each State may use whatever State, local, Federal, and private sources of support are available in the State to meet the requirements of this part. For example, when it is necessary to place a handicapped child in a residential facility, a State could use joint agreements between the agencies involved for sharing the cost of that placement.

(b) Nothing in this part relieves an insurer or similar third party from an otherwise valid obligation to provide or to pay for services provided to a handicapped child.

(20 U.S.C. 1401(18); 1412(2)(B).)

§ 121a.302 Residential placement.

If placement in a public or private residential program is necessary to provide special education and related services to a handicapped child, the program, including non-medical care and room and board, must be at no cost to the parents of the child.

(20 U.S.C. 1412(2)(B); 1413(a)(4)(B).)

Comment. This requirement applies to placements which are made by public agencies for educational purposes, and includes placements in State-operated schools for the handicapped, such as a State school for the deaf or blind.

§ 121a.303 Proper functioning of hearing aids.

Each public agency shall insure that the hearing aids worn by deaf and hard of hearing children in school are functioning properly.

(20 U.S.C. 1412(2)(B).)

Comment. The report of the House of Representatives on the 1978 appropriation bill includes the following statement regarding hearing aids:

In its report on the 1976 appropriation bill the Committee expressed concern about the condition of hearing aids worn by children in public schools. A study done at the Committee's direction by the Bureau of Education for the Handicapped reveals that up to one-third of the hearing aids are malfunctioning. Obviously, the Committee expects the Office of Education will ensure that hearing impaired school children are receiving adequate professional assessment, follow-up and services.

(House Report No. 95-381, p. 67 (1977).)

§ 121a.304 Full educational opportunity goal.

(a) Each State educational agency shall insure that each public agency establishes and implements a goal of providing full educational opportunity to all handicapped children in the area served by the public agency.

(b) Subject to the priority requirements under §§ 121a.320–121a.324, a State or local educational agency may use Part B funds to provide facilities, personnel, and services necessary to meet the full educational opportunity goal.

(20 U.S.C. 1412(2)(A); 1414(a)(1)(C).)

Comment. In meeting the full educational opportunity goal, the Congress also encouraged local educational agencies to include artistic and cultural activities in programs supported under this part, subject to the priority requirements under §§ 121a.320–121a.324. This point is addressed in the following statements from the Senate Report on Pub. L. 94-142:

The use of the arts as a teaching tool for the handicapped has long been recognized as a viable, effective way not only of teaching special skills, but also of reaching youngsters who had otherwise been unteachable. The Committee envisions that programs under this bill could well include an arts component and, indeed, urges that local educational agencies include the arts in programs for the handicapped funded under this Act. Such a program could cover both appreciation of the arts by the handicapped youngsters, and the utilization of the arts as a teaching tool per se.

Museum settings have often been another effective tool in the teaching of handicapped children. For example, the Brooklyn Museum has been a leader in developing exhibits utilizing the heightened tactile sensory skill of the blind. Therefore, in light of the national policy concerning the use of museums in Federally-supported education programs enunciated in the Education Amendments of 1974, the Committee also urges local educational agencies to include museums in programs for the handicapped funded under this Act.

(Senate Report No. 94-168, p. 13 (1975).)

§ 121a.305 Program options.

Each public agency shall take steps to insure that its handicapped children have available to them the variety of educational programs and services available to non-handicapped children in the

area served by the agency, including art, music, industrial arts, consumer and homemaking education, and vocational education.

(20 U.S.C. 1412(2)(A); 1414(a)(1)(C).)

Comment. The above list of program options is not exhaustive, and could include any program or activity in which nonhandicapped students participate. Moreover, vocational education programs must be specially designed if necessary to enable a handicapped student to benefit fully from those programs; and the set-aside funds under the Vocational Education Act of 1963, as amended by Pub. L. 94-482, may be used for this purpose. Part B funds may also be used, subject to the priority requirements under §§ 121a.320–121a.324.

§ 121a.306 Nonacademic services.

(a) Each public agency shall take steps to provide nonacademic and extracurricular services and activities in such manner as is necessary to afford handicapped children an equal opportunity for participation in those services and activities.

(b) Nonacademic and extracurricular services and activities may include counseling services, athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the public agency, referrals to agencies which provide assistance to handicapped persons, and employment of students, including both employment by the public agency and assistance in making outside employment available.

(20 U.S.C. 1412(2)(A); 1414(a)(1)(C).)

§ 121a.307 Physical education.

(a) *General.* Physical education services, specially designed if necessary, must be made available to every handicapped child receiving a free appropriate public education.

(b) *Regular physical education.* Each handicapped child must be afforded the opportunity to participate in the regular physical education program available to non-handicapped children unless:

(1) The child is enrolled full time in a separate facility; or

(2) The child needs specially designed physical education, as prescribed in the child's individualized education program.

(c) *Special physical education.* If specially designed physical education is prescribed in a child's individualized education program, the public agency responsible for the education of that child shall provide the services directly, or make arrangements for it to be provided through other public or private programs.

(d) *Education in separate facilities.* The public agency responsible for the education of a handicapped child who is enrolled in a separate facility shall insure that the child receives appropriate physical education services in compliance with paragraphs (a) and (c) of this section.

(20 U.S.C. 1401(16); 1412(5)(B); 1414(a)(6).)

Comment. The Report of the House of Representatives on Pub. L. 94-142 includes the following statement regarding physical education:

Special education as set forth in the Committee bill includes instruction in physical education, which is provided as a matter of course to all non-handicapped children enrolled in public elementary and secondary schools. The Committee is concerned that although these services are available to and required of all children in our school systems, they are often viewed as a luxury for handicapped children.

* * * * *

The Committee expects the Commissioner of Education to take whatever action is necessary to assure that physical education services are available to all handicapped children, and has specifically included physical education within the definition of special education to make clear that the Committee expects such services, specially designed where necessary, to be provided as an integral part of the educational program of every handicapped child.

(House Report No. 94-332, p. 9 (1975).)

PRIORITIES IN THE USE OF PART B FUNDS

§ 121a.320 Definitions of "first priority children" and "second priority children."

For the purposes of §§ 121a.321–121a.324, the term:

(a) "First priority children" means handicapped children who:

(1) Are in an age group for which the State must make available free appropriate public education under § 121a.300; and

(2) Are not receiving any education.

(b) "Second priority children" means handicapped children, within each disability, with the most severe handicaps who are receiving an inadequate education.

(20 U.S.C. 1412(3).)

Comment. After September 1, 1978, there could be no second priority children, since States must insure, as a condition of receiving Part B funds for fiscal year 1979, that all handicapped children will have available a free appropriate public education by that date.

NOTE.—The term "free appropriate public education," as defined in § 121a.4 of Subpart A, means "special education and related services which * * * are provided in conformity with an individualized education program * * *."

New "First priority children" will continue to be found by the State after September 1, 1978 through on-going efforts to identify, locate, and evaluate all handicapped children.

§ 121a.321 Priorities.

(a) Each State and local educational agency shall use funds provided under Part B of the Act in the following order of priorities:

(1) To provide free appropriate public education to first priority children, including the identification, location, and evaluation of first priority children.

(2) To provide free appropriate public education to second priority children, including the identification, location, and evaluation of second priority children.

(3) To meet the other requirements in this part.

(b) The requirements of paragraph (a) of this section do not apply to funds which the State uses for administration under § 121a.620.

(20 U.S.C. 1411 (b)(1)(B), (b)(2)(B), (c)(1)(B), (c)(2)(A)(ii).

(c) State and local educational agencies may not use funds under Part B of the Act for preservice training.

(20 U.S.C. 1413(a)(3); Senate Report No. 94-168, p. 34 (1975).)

Comment. Note that a State educational agency as well as local educational agencies must use Part B funds (except the portion used for State administration) for the priorities. A State may have to set aside a portion of its Part B allotment to be able to serve newly-identified first priority children.

After September 1, 1978, Part B funds may be used:

(1) To continue supporting child identification, location, and evaluation activities;

(2) To provide free appropriate public education to newly identified first priority children;

(3) To meet the full educational opportunities goal required under section 121a.304, including employing additional personnel and providing inservice training, in order to increase the level, intensity and quality of services provided to individual handicapped children; and

(4) To meet the other requirements of Part B.

§ 121a.322 First priority children—school year 1977–1978.

(a) In school year 1977–1978, if a major component of a first priority child's proposed educational program is not available (for example, there is no qualified teacher), the public agency responsible for the child's education shall:

(1) Provide an interim program of services for the child; and

(2) Develop an individualized education program for full implementation no later than September 1, 1978.

(b) A local educational agency may use Part B funds for training or other support services in school year 1977–1978 only if all of its first priority children have available to them at least an interim program of services.

(c) A State educational agency may use Part B funds for training or other support services in school year 1977–1978 only if all first priority children in the State have available to them at least an interim program of services.

(20 U.S.C. 1411 (b), (c).)

Comment. This provision is intended to make it clear that a State or local educational agency may not delay placing a previously unserved (first priority) child until it has, for example, implemented an inservice training program. The child must be placed. After the child is in at least an interim program, the State or local educational agency may use Part B funds for training or other support services needed to provide that child with a free appropriate public education.

§ 121a.323 Services to other children.

If a State or a local educational agency is providing free appropriate public education to all of its first priority children,

that State or agency may use funds provided under Part B of the Act:

(a) To provide free appropriate public education to handicapped children who are not receiving any education and who are in the age groups not covered under § 121a.300 in that State; or

(b) To provide free appropriate public education to second priority children; or

(c) Both.

(20 U.S.C. 1411(b)(1)(B), (b)(2)(B), (c)(2)(A)(ii).)

§ 121a.324 Application of local educational agency to use funds for the second priority.

A local educational agency may use funds provided under Part B of the Act for second priority children, if it provides assurance satisfactory to the State educational agency in its application (or an amendment to its application):

(a) That all first priority children have a free appropriate public education available to them;

(b) That the local educational agency has a system for the identification, location, and evaluation of handicapped children, as described in its application; and

(c) That whenever a first priority child is identified, located, and evaluated, the local educational agency makes available a free appropriate public education to the child.

(20 U.S.C. 1411 (b)(1)(B), (c)(1)(B); 1414(a)(1)(C)(ii).)

INDIVIDUALIZED EDUCATION PROGRAMS

§ 121a.340 Definition.

As used in this part, the term "individualized education program" means a written statement for a handicapped child that is developed and implemented in accordance with §§ 121a.341–121a.349.

(20 U.S.C. 1401(19).)

§ 121a.341 State educational agency responsibility.

(a) *Public agencies.* The State educational agency shall insure that each public agency develops and implements an individualized education program for each of its handicapped children.

(b) *Private schools and facilities.* The State educational agency shall insure that an individualized education program is developed and implemented for each handicapped child who:

(1) Is placed in or referred to a private school or facility by a public agency; or

(2) Is enrolled in a parochial or other private school and receives special education or related services from a public agency.

(20 U.S.C. 1412 (4), (6); 1413(a)(4).)

Comment: This section applies to all public agencies, including other State agencies (e.g., departments of mental health and welfare), which provide special education to a handicapped child either directly, by contract or through other arrangements. Thus, if a State welfare agency contracts with a private school or facility to provide special education to a handicapped child, that agency would be responsible for insuring that an individualized education program is developed for the child.

§ 121a.342 When individualized education programs must be in effect.

(a) On October 1, 1977, and at the beginning of each school year thereafter, each public agency shall have in effect an individualized education program for every handicapped child who is receiving special education from that agency.

(b) An individualized education program must:

(1) Be in effect before special education and related services are provided to a child; and

(2) Be implemented as soon as possible following the meetings under § 121a.343.

(20 U.S.C. 1412 (2)(B), (4), (6); 1414(a)(5); Pub. L. 94–142, Sec. 8(c) (1975).)

Comment. Under paragraph (b)(2), it is expected that a handicapped child's individualized education program (IEP) will be implemented immediately following the meetings under § 121a.343. An exception to this would be (1) when the meetings occur during the summer or a vacation period, or (2) where there are circumstances which require a short delay (e.g., working out transportation arrangements). However, there can be no undue delay in providing special education and related services to the child.

§ 121a.343 Meetings.

(a) *General.* Each public agency is responsible for initiating and conducting meetings for the purpose of developing, reviewing, and revising a handicapped child's individualized education program.

(b) *Handicapped children currently served.* If the public agency has determined that a handicapped child will receive special education during school year 1977–1978, a meeting must be held early enough to insure that an individualized education program is developed by October 1, 1977.

(c) *Other handicapped children.* For a handicapped child who is not included under paragraph (b) of this action, a meeting must be held within thirty calendar days of a determination that the child needs special education and related services.

(d) *Review.* Each public agency shall initiate and conduct meetings to periodically review each child's individualized education program and if appropriate revise its provisions. A meeting must be held for this purpose at least once a year.

(20 U.S.C. 1412 (2)(B), (4), (6); 1414(a)(5).)

Comment. The dates on which agencies must have individualized education programs (IEPs) in effect are specified in § 121a.342 (October 1, 1977, and the beginning of each school year thereafter). However, except for new handicapped children (i.e., those evaluated and determined to need special education after October 1, 1977), the timing of meetings to develop, review, and revise IEPs is left to the discretion of each agency.

In order to have IEPs in effect by the dates in § 121a.342, agencies could hold meetings at the end of the school year or during the summer preceding those dates. In meeting the October 1, 1977 timeline, meetings could be conducted up through the October 1 date. Thereafter, meetings may be held any time throughout the year, as long as IEPs are in effect at the beginning of each school year.

The statute requires agencies to hold a meeting at least once each year in order to review, and if appropriate revise, each child's IEP. The timing of those meetings could be on the anniversary date of the last IEP meeting on the child, but this is left to the discretion of the agency.

§ 121a.344 Participants in meetings.

(a) *General.* The public agency shall insure that each meeting includes the following participants:

(1) A representative of the public agency, other than the child's teacher, who is qualified to provide, or supervise the provision of, special education.

(2) The child's teacher.

(3) One or both of the child's parents, subject to § 121a.345.

(4) The child, where appropriate.

(5) Other individuals at the discretion of the parent or agency.

(b) *Evaluation personnel.* For a handicapped child who has been evaluated for the first time, the public agency shall insure:

(1) That a member of the evaluation team participates in the meeting; or

(2) That the representative of the public agency, the child's teacher, or some other person is present at the meeting, who is knowledgeable about the evaluation procedures used with the child and is familiar with the results of the evaluation.

(20 U.S.C. 1401(19); 1412 (2)(B), (4), (6); 1414(a)(5).)

Comment. 1. In deciding which teacher will participate in meetings on a child's individualized education program, the agency may wish to consider the following possibilities:

(a) For a handicapped child who is receiving special education, the "teacher" could be the child's special education teacher. If the child's handicap is a speech impairment, the "teacher" could be the speech-language pathologist.

(b) For a handicapped child who is being considered for placement in special education, the "teacher" could be the child's regular teacher, or a teacher qualified to provide education in the type of program in which the child may be placed, or both.

(c) If the child is not in school or has more than one teacher, the agency may designate which teacher will participate in the meeting.

2. Either the teacher or the agency representative should be qualified in the area of the child's suspected disability.

3. For a child whose primary handicap is a speech impairment, the evaluation personnel participating under paragraph (b)(1) of this section would normally be the speech-language pathologist.

§ 121a.345 Parent participation.

(a) Each public agency shall take steps to insure that one or both of the parents of the handicapped child are present at each meeting or are afforded the opportunity to participate, including:

(1) Notifying parents of the meeting early enough to insure that they will have an opportunity to attend; and

(2) Scheduling the meeting at a mutually agreed on time and place.

(b) The notice under paragraph (a)(1) of this section must indicate the pur-

pose, time, and location of the meeting, and who will be in attendance.

(c) If neither parent can attend, the public agency shall use other methods to insure parent participation, including individual or conference telephone calls.

(d) A meeting may be conducted without a parent in attendance if the public agency is unable to convince the parents that they should attend. In this case the public agency must have a record of its attempts to arrange a mutually agreed on time and place such as:

(1) Detailed records of telephone calls made or attempted and the results of those calls.

(2) Copies of correspondence sent to the parents and any responses received, and

(3) Detailed records of visits made to the parent's home or place of employment and the results of those visits.

(e) The public agency shall take whatever action is necessary to insure that the parent understands the proceedings at a meeting, including arranging for an interpreter for parents who are deaf or whose native language is other than English.

(f) The public agency shall give the parent, on request, a copy of the individualized education program.

(20 U.S.C. 1401(19); 1412 (2)(B), (4), (6); 1414(a)(5).)

Comment. The notice in paragraph (a) could also inform parents that they may bring other people to the meeting. As indicated in paragraph (c), the procedure used to notify parents (whether oral or written or both) is left to the discretion of the agency, but the agency must keep a record of its efforts to contact parents.

§ 121a.346 Content of individualized education program.

The individualized education program for each child must include:

(a) A statement of the child's present levels of educational performance;

(b) A statement of annual goals, including short term instructional objectives;

(c) A statement of the specific special education and related services to be provided to the child, and the extent to which the child will be able to participate in regular educational programs;

(d) The projected dates for initiation of services and the anticipated duration of the services; and

(e) Appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether the short term instructional objectives are being achieved.

(20 U.S.C. 1401(19); 1412 (2)(B), (4), (6), 1414(a)(5); Senate Report No. 94-168, p. 11 (1975).)

§ 121a.347 Private school placements.

(a) *Developing individualized education programs.* (1) Before a public agency places a handicapped child in, or refers a child to, a private school or facility, the agency shall initiate and conduct a meeting to develop an individualized education program for the child in accordance with § 121a.343.

(2) The agency shall insure that a representative of the private school facility attends the meeting. If the representative cannot attend, the agency shall use other methods to insure participation by the private school or facility, including individual or conference telephone calls.

(3) The public agency shall also develop an individualized educational program for each handicapped child who was placed in a private school or facility by the agency before the effective date of these regulations.

(b) *Reviewing and revising individualized education programs.* (1) After a handicapped child enters a private school or facility, any meetings to review and revise the child's individualized education program may be initiated and conducted by the private school or facility at the discretion of the public agency.

(2) If the private school or facility initiates and conducts these meetings, the public agency shall insure that the parents and an agency representative:

(i) Are involved in any decision about the child's individualized education program; and

(ii) Agree to any proposed changes in the program before those changes are implemented.

(c) *Responsibility.* Even if a private school or facility implements a child's individualized education program, responsibility for compliance with this part remains with the public agency and the State educational agency.

(20 U.S.C. 1413(a)(4)(B).)

§ 121a.348 Handicapped children in parochial or other private schools.

If a handicapped child is enrolled in a parochial or other private school and receives special education or related services from a public agency, the public agency shall:

(a) Initiate and conduct meetings to develop, review, and revise an individualized education program for the child, in accordance with § 121a.343; and

(b) Insure that a representative of the parochial or other private school attends each meeting. If the representative cannot attend, the agency shall use other methods to insure participation by the private school, including individual or conference telephone calls.

(20 U.S.C. 1413(a)(4)(A).)

§ 121a.349 Individualized education program—accountability.

Each public agency must provide special education and related services to a handicapped child in accordance with an individualized education program. However, Part B of the Act does not require that any agency, teacher, or other person be held accountable if a child does not achieve the growth projected in the annual goals and objectives.

(20 U.S.C. 1412(2)(B); 1414(a) (5), (6); Cong. Rec. at H 7152 (daily ed., July 21, 1975).)

Comment. This section is intended to relieve concerns that the individualized education program constitutes a guarantee by the public agency and the teacher that a child will progress at a specified rate. However, this section does not relieve agencies and teachers from making good faith efforts to assist the child in achieving the objectives and goals listed in the individualized education program. Further, the section does not limit a parent's right to complain and ask for revisions of the child's program, or to invoke due process procedures, if the parent feels that these efforts are not being made.

DIRECT SERVICE BY THE STATE EDUCATIONAL AGENCY

§ 121a.360 Use of local educational agency allocation for direct services.

(a) A State educational agency may not distribute funds to a local educational agency, and shall use those funds to insure the provision of a free appropriate public education to handicapped children residing in the area served by the local educational agency, if the local educational agency, in any fiscal year:

(1) Is entitled to less than $7,500 for that fiscal year (beginning with fiscal year 1979);

(2) Does not submit an application that meets the requirements of §§ 121a.220–121a.240;

(3) Is unable or unwilling to establish and maintain programs of free appropriate public education;

(4) Is unable or unwilling to be consolidated with other local educational agencies in order to establish and maintain those programs; or

(5) Has one or more handicapped children who can best be served by a regional or State center designed to meet the needs of those children.

(b) In meeting the requirements of paragraph (a) of this section, the State educational agency may provide special education and related services directly, by contract, or through other arrangements.

(c) The excess cost requirements under §§ 121a.182–121a.186 do not apply to the State educational agency.

(20 U.S.C. 1411(c)(4); 1413(b); 1414(d).)

Comment. Section 121a.360 is a combination of three provisions in the statute (Sections 611(c)(4), 613(b), and 614(d)). This section focuses mainly on the State's administration and use of local entitlements under Part B.

The State educational agency, as a recipient of Part B funds is responsible for insuring that all public agencies in the State comply with the provisions of the Act, regardless of whether they receive Part B funds. If a local educational agency elects not to apply for its Part B entitlement, the State would be required to use those funds to insure that a free appropriate public education (FAPE) is made available to children residing in the area served by that local agency. However, if the local entitlement is not sufficient for this purpose, additional State or local funds would have to be expended in order to insure that "FAPE" and the other requirements of the Act are met.

Moreover, if the local educational agency is the recipient of any other Federal funds, it would have to be in compliance with Subpart D of the regulations for section 504 of the Rehabilitation Act of 1973 (45 CFR Part 84). It should be noted that the term "FAPE" has different meanings under Part B and section 504. For example, under Part

B, "FAPE" is a statutory term which requires special education and related services to be provided in accordance with an individualized education program (IEP). However, under section 504, each recipient must provide an education which includes services that are "designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met • • •" Those regulations state that implementation of an IEP, in accordance with Part B, is one means of meeting the "FAPE" requirement.

§ 121a.361 Nature and location of services.

The State educational agency may provide special education and related services under § 121a.360(a) in the manner and at the location it considers appropriate. However, the manner in which the education and services are provided must be consistent with the requirements of this part (including the least restrictive environment provisions in §§ 121a.550–121a.556 of Subpart E).

(20 U.S.C. 1414(d).)

§ 121a.370 Use of State educational agency allocation for direct and support services.

(a) The State shall use the portion of its allocation it does not use for administration to provide support services and direct services in accordance with the priority requirements under §§ 121a.320–121a.324.

(b) For the purposes of paragraph (a) of this section:

(1) "Direct services" means services provided to a handicapped child by the State directly, by contract, or through other arrangements.

(2) "Support services" includes implementing the comprehensive system of personnel development under §§ 121a.380–121a.388, recruitment and training of hearing officers and surrogate parents, and public information and parent training activities relating to a free appropriate public education for handicapped children.

(20 U.S.C. 1411(b)(2), (c)(2).)

§ 121a.371 State matching.

Beginning with the period July 1, 1978–June 30, 1979, and for each following year, the funds that a State uses for direct and support services under § 121a.370 most be matched on a program basis by the State from funds other than Federal funds. This requirement does not apply to funds that the State uses under § 121a.360.

(20 U.S.C. 1411(c)(2)(B), (c)(4)(B).)

Comment. The requirement in § 121a.371 would be satisfied if the State can document that the amount of State funds expended for each major program area (e.g., the comprehensive system of personnel development) is at least equal to the expenditure of Federal funds in that program area.

§ 121a.372 Applicability of non-supplanting requirement.

Beginning with funds appropriated for Fiscal Year 1979 and for each following Fiscal Year, the requirement in section 613(a)(9) of the Act, which prohibits supplanting with Federal funds, does not apply to funds that the State uses from its allocation under § 121a.706(a) of Subpart G for administration, direct services, or support services.

(20 U.S.C. 1411(c)(3).)

COMPREHENSIVE SYSTEM OF PERSONNEL DEVELOPMENT

§ 121a.380 Scope of system.

Each annual program plan must include a description of programs and procedures for the development and implementation of a comprehensive system of personnel development which includes:

(a) The inservice training of general and special educational instructional, related services, and support personnel;

(b) Procedures to insure that all personnel necessary to carry out the purposes of the Act are qualified (as defined in § 121a.12 of Subpart A) and that activities sufficient to carry out this personnel development plan are scheduled; and

(c) Effective procedures for acquiring and disseminating to teachers and administrators of programs for handicaped children significant information derived from educational research, demonstration, and similar projects, and for adopting, where appropriate, promising educational practices and materials developed through those projects.

(20 U.S.C. 1413(a)(3).)

§ 121a.381 Participation of other agencies and institutions.

(a) The State educational agency must insure that all public and private institutions of higher education, and other agencies and organizations (including representatives of handicapped, parent, and other advocacy organizations) in the State which have an interest in the preparation of personnel for the education of handicapped children, have an opportunity to participate fully in the development, review, and annual updating of the comprehensive system of personnel development.

(b) The annual program plan must describe the nature and extent of participation under paragraph (a) of this section and must describe responsibilities of the State educational agency, local educational agencies, public and private institutions of higher education, and other agencies:

(1) With respect to the comprehensive system as a whole, and

(2) With respect to the personnel development plan under § 121a.383.

(20 U.S.C. 1412(7)(A); 1413(a)(3).)

§ 121a.382 Inservice training.

(a) As used in this section, "inservice training" means any training other than that received by an individual in a full-time program which leads to a degree.

(b) Each annual program plan must provide that the State educational agency:

(1) Conducts an annual needs assessment to determine if a sufficient number of qualified personnel are available in the State; and

(2) Initiates inservice personnel development programs based on the assessed needs of State-wide significance related to the implementation of the Act.

(c) Each annual program plan must include the results of the needs assessment under paragraph (b)(1) of this section, broken out by need for new personnel and need for retrained personnel.

(d) The State educational agency may enter into contracts with institutions of higher education, local educational agencies or other agencies, institutions, or organizations (which may include parent, handicapped, or other advocacy organizations), to carry out:

(1) Experimental or innovative personnel development programs;

(2) Development or modification of instructional materials; and

(3) Dissemination of significant information derived from educational research and demonstration projects.

(e) Each annual program plan must provide that the State educational agency insures that ongoing inservice training programs are available to all personnel who are engaged in the education of handicapped children, and that these programs include:

(1) The use of incentives which insure participation by teachers (such as released time, payment for participation, options for academic credit, salary step credit, certification renewal, or updating professional skills);

(2) The involvement of local staff; and

(3) The use of innovative practices which have been found to be effective.

(f) Each annual program plan must:

(1) Describe the process used in determining the inservice training needs of personnel engaged in the education of handicapped children;

(2) Identify the areas in which training is needed (such as individualized education programs, non-discriminatory testing, least restrictive environment, procedural safeguards, and surrogate parents);

(3) Specify the groups requiring training (such as special teachers, regular teachers, administrators, psychologists, speech-language pathologists, audiologists, physical education teachers, therapeutic recreation specialists, physical therapists, occupational therapists, medical personnel, parents, volunteers, hearing officers, and surrogate parents);

(4) Describe the content and nature of training for each area under paragraph (f)(2) of this section;

(5) Describe how the training will be provided in terms of (i) geographical scope (such as Statewide, regional, or local), and (ii) staff training source (such as college and university staffs, State and local educational agency personnel, and non-agency personnel);

(6) Specify: (i) The funding sources to be used, and

(ii) The time frame for providing it; and

(7) Specify procedures for effective evaluation of the extent to which program objectives are met.

(20 U.S.C. 1413(a)(3).)

§ 121a.383 Personnel development plan.

Each annual program plan must: (a) Include a personnel development plan which provides a structure for personnel planning and focuses on preservice and inservice education needs;

(b) Describe the results of the needs assessment under § 121a.382(b)(1) with respect to identifying needed areas of training, and assigning priorities to those areas; and

(c) Identify the target populations for personnel development, including general education and special education instructional and administrative personnel, support personnel, and other personnel (such as paraprofessionals, parents, surrogate parents, and volunteers).

(20 U.S.C. 1413(a)(3).)

§ 121a.384 Dissemination.

(a) Each annual program plan must include a description of the State's procedures for acquiring, reviewing, and disseminating to general and special educational instructional and support personnel, administrators of programs for handicapped children, and other interested agencies and organizations (including parent, handicapped, and other advocacy organizations) significant information and promising practices derived from educational research, demonstration, and other projects.

(b) Dissemination includes:

(1) Making those personnel, administrators, agencies, and organizations aware of the information and practices;

(2) Training designed to enable the establishment of innovative programs and practices targeted on identified local needs; and

(3) Use of instructional materials and other media for personnel development and instructional programming.

(20 U.S.C. 1413(a)(3).)

§ 121a.385 Adoption of educational practices.

(a) Each annual program plan must provide for a statewide system designed to adopt, where appropriate, promising educational practices and materials proven effective through research and demonstration.

(b) Each annual program plan must provide for thorough reassessment of educational practices used in the State.

(c) Each annual program plan must provide for the identification of State, local, and regional resources (human and material) which will assist in meeting the State's personnel preparation needs.

(20 U.S.C. 1413(a)(3).)

§ 121a.386 Evaluation.

Each annual program plan must include:

(a) Procedures for evaluating the overall effectiveness of:

(1) The comprehensive system of personnel development in meeting the needs for personnel, and

(2) The procedures for administration of the system; and

(b) A description of the monitoring activities that will be undertaken to assure the implementation of the comprehensive system of personnel development.

(20 U.S.C. 1413(a)(3).)

§ 121a.387 Technical assistance to local educational agencies.

Each annual program plan must include a description of technical assistance that the State educational agency gives to local educational agencies in their implementation of the State's comprehensive system of personnel development.

(20 U.S.C. 1413(a)(3).)

Subpart D—Private Schools

HANDICAPPED CHILDREN IN PRIVATE SCHOOLS PLACED OR REFERRED BY PUBLIC AGENCIES

§ 121a.400 Applicability of §§ 121a.401–121a.403.

Sections 121a.401–121a.403 apply only to handicapped children who are or have been placed in or referred to a private school or facility by a public agency as a means of providing special education and related services.

(20 U.S.C. 1413(a)(4)(B).)

§ 121a.401 Responsibility of State educational agency.

Each State educational agency shall insure that a handicapped child who is placed in or referred to a private school or facility by a public agency:

(a) Is provided special education and related services:

(1) In conformance with an individualized education program which meets the requirements under §§ 121a.340–121a.349 of Subpart C;

(2) At no cost to the parents; and

(3) At a school or facility which meets the standards that apply to State and local educational agencies (including the requirements in this part); and

(b) Has all of the rights of a handicapped child who is served by a public agency.

(20 U.S.C. 1413(a)(4)(B).)

§ 121a.402 Implementation by State educational agency.

In implementing § 121a.401, the State educational agency shall:

(a) Monitor compliance through procedures such as written reports, on-site visits, and parent questionnaires;

(b) Disseminate copies of applicable standards to each private school and facility to which a public agency has referred or placed a handicapped child; and

(c) Provide an opportunity for those private schools and facilities to participate in the development and revision of State standards which apply to them.

(20 U.S.C. 1413(a)(4)(B).)

§ 121a.403 Placement of children by parents.

(a) If a handicapped child has available a free appropriate public education and the parents choose to place the child in a private school or facility, the public agency is not required by this part to pay for the child's education at the private school or facility. However, the public agency shall make services available to the child as provided under §§ 121a.450–121a.460.

(b) Disagreements between a parent and a public agency regarding the availability of a program appropriate for the child, and the question of financial responsibility, are subject to the due process procedures under §§ 121a.500–121a.514 of Subpart E.

(20 U.S.C. 1412(2)(B); 1415).)

HANDICAPPED CHILDREN IN PRIVATE SCHOOLS NOT PLACED OR REFERRED BY PUBLIC AGENCIES

§ 121a.450 Applicability of §§ 121a.451–121a.460.

As used in §§ 121a.451–121a.460, "private school handicapped children" means handicapped children enrolled in private schools or facilities other than handicapped children covered under §§ 121a.400–121a.403.

(20 U.S.C. 1413(a)(4)(A).)

§ 121a.451 State educational agency responsibility.

The State educational agency shall insure that:

(a) To the extent consistent with their number and location in the State, provision is made for the participation of private school handicapped children in the program assisted or carried out under this part by providing them with special education and related services; and

(b) The other requirements in §§ 121a.452–121a.460 are met.

(20 U.S.C. 1413(a)(4)(A).)

§ 121a.452 Local educational agency responsibility.

(a) Each local educational agency shall provide special education and related services designed to meet the needs of private school handicapped children residing in the jurisdiction of the agency.

(b) Each local educational agency shall provide private school handicapped children with genuine opportunities to participate in special education and related services consistent with the number of those children and their needs.

(20 U.S.C. 1413(a)(4)(A); 1414(a)(6).)

§ 121a.453 Determination of needs, number of children, and types of services.

The needs of private school handicapped children, the number of them who will participate under this part, and the types of special education and related services which the local educational agency will provide for them must be determined after consultation with persons knowledgeable of the needs of these

children, on a basis comparable to that used in providing for the participation under this part of handicapped children enrolled in public schools.

(20 U.S.C. 1413(a)(4)(A).)

§ 121a.454 Service arrangements.

Services to private school handicapped children may be provided through such arrangements as dual enrollment, educational radio and television, and the provision of mobile educational services and equipment.

(20 U.S.C. 1413(a)(4)(A).)

§ 121a.455 Differences in services to private school handicapped children.

A local educational agency may provide special education and related services to private school handicapped children which are different from the special education and related services it provides to public school children, if:

(a) The differences are necessary to meet the special needs of the private school handicapped children, and

(b) The special education and related services are comparable in quality, scope, and opportunity for participation to those provided to public school children with needs of equal importance.

(20 U.S.C. 1413(a)(4)(a); *Wheeler* v. *Barrera*, 417 U.S. 402 (1974).)

§ 121a.456 Personnel.

(a) Public school personnel may be made available in other than public school facilities only to the extent necessary to provide services required by the handicapped children for whose needs those services were designed, and only when those services are not normally provided by the private school.

(b) Each State or local educational agency providing services to children enrolled in private schools shall maintain continuing administrative control and direction over those services.

(c) The services provided with funds under Part B of the Act for eligible handicapped children enrolled in private schools may not include:

(1) The payment of salaries of teachers or other employees of private schools except for services performed outside their regular hours of duty and under public supervision and control; or

(2) The construction of private school facilities.

(20 U.S.C. 1413(a)(4)(A).)

§ 121a.457 Equipment.

(a) Equipment acquired with funds under Part B of the Act may be placed on private school premises for a limited period of time, but the title to and administrative control over all equipment must be retained and exercised by a public agency.

(b) In exercising administrative control, the public agency shall keep records of and account for the equipment, and shall insure that the equipment is used solely for the purposes of the program or project, and remove the equipment from the private school premises if necessary to avoid its being used for other purposes or if it is no longer needed for the purposes of the program or project.

(20 U.S.C. 1413(a)(4)(A).)

§ 121a.458 Prohibition of segregation.

Programs or projects carried out in public facilities, and involving joint participation by eligible handicapped children enrolled in private schools and handicapped children enrolled in public schools, may not include classes that are separated on the basis of school enrollment or the religious affiliations of the children.

(20 U.S.C. 1413(a)(4)(A).)

§ 121a.459 Funds and property not to benefit private school.

Funds provided under Part B of the Act and property derived from those funds may not inure to the benefit of any private school.

(20 U.S.C. 1413(a)(4)(A).)

§ 121a.460 Existing level of instruction.

Provisions for serving private school handicapped children may not include the financing of the existing level of instruction in the private schools.

(20 U.S.C. 1413(a)(4)(A).)

Subpart E—Procedural Safeguards

Due Process Procedures for Parents and Children

§ 121a.500 Definitions of "consent", "evaluation", and "personally identifiable".

As used in this part: "Consent" means that: (a) The parent has been fully informed of all information relevant to the activity for which consent is sought, in his or her native language, or other mode of communication;

(b) The parent understands and agrees in writing to the carrying out of the activity for which his or her consent is sought, and the consent describes that activity and lists the records (if any) which will be released and to whom; and

(c) The parent understands that the granting of consent is voluntary on the part of the parent and may be revoked at any time.

"Evaluation" means procedures used in accordance with §§ 121a.530–121a.534 to determine whether a child is handicapped and the nature and extent of the special education and related services that the child needs. The term means procedures used selectively with an individual child and does not include basic tests administered to or procedures used with all children in a school, grade, or class.

"Personally identifiable" means that information includes:

(a) The name of the child, the child's parent, or other family member;

(b) The address of the child;

(c) A personal identifier, such as the child's social security number or student number; or

(d) A list of personal characteristics or other information which would make it possible to identify the child with reasonable certainty.

(20 U.S.C. 1415, 1417(c).)

§ 121a.501 General responsibility of public agencies.

Each State educational agency shall insure that each public agency establishes and implements procedural safeguards which meet the requirements of §§ 121a.500–121a.514.

(20 U.S.C. 1415(a).)

§ 121a.502 Opportunity to examine records.

The parents of a handicapped child shall be afforded, in accordance with the procedures in §§ 121a.562–121a.569 an opportunity to inspect and review all education records with respect to:

(a) The identification, evaluation, and educational placement of the child, and

(b) The provision of a free appropriate public education to the child.

(20 U.S.C. 1415(b)(1)(A).)

§ 121a.503 Independent educational evaluation.

(a) *General.* (1) The parents of a handicapped child have the right under this part to obtain an independent educational evaluation of the child, subject to paragraphs (b) through (e) of this section.

(2) Each public agency shall provide to parents, on request, information about where an independent educational evaluation may be obtained.

(3) For the purposes of this part:

(i) "Independent educational evaluation" means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question.

(ii) "Public expense" means that the public agency either pays for the full cost of the evaluation or insures that the evaluation is otherwise provided at no cost to the parent, consistent with § 121a.301 of Subpart C.

(b) *Parent right to evaluation at public expense.* A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency. However, the public agency may initiate a hearing under § 121a.506 of this subpart to show that its evaluation is appropriate. If the final decision is that the evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at public expense.

(c) *Parent initiated evaluations.* If the parent obtains an independent educational evaluation at private expense, the results of the evaluation:

(1) Must be considered by the public agency in any decision made with respect to the provision of a free appropriate public education to the child, and

(2) May be presented as evidence at a hearing under this subpart regarding that child.

(d) *Requests for evaluations by hearing officers.* If a hearing officer requests an independent educational evaluation as part of a hearing, the cost of the evaluation must be at public expense.

(e) *Agency criteria.* Whenever an independent evaluation is at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, must be the same as the criteria which the public agency uses when it initiates an evaluation.

(20 U.S.C. 1415(b)(1)(A).)

§ 121a.504 Prior notice; parent consent.

(a) *Notice.* Written notice which meets the requirements under § 121a.505 must be given to the parents of a handicapped child a reasonable time before the public agency:

(1) Proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child, or

(2) Refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child.

(b) *Consent.* (1) Parental consent must be obtained before:

(i) Conducting a preplacement evaluation; and

(ii) Initial placement of a handicapped child in a program providing special education and related services.

(2) Except for preplacement evaluation and initial placement, consent may not be required as a condition of any benefit to the parent or child.

(c) *Procedures where parent refuses consent.* (1) Where State law requires parental consent before a handicapped child is evaluated or initially provided special education and related services, State procedures govern the public agency in overriding a parent's refusal to consent.

(2)(i) Where there is no State law requiring consent before a handicapped child is evaluated or initially provided special education and related services, the public agency may use the hearing procedures in §§ 121a.506–121a.508 to determine if the child may be evaluated or initially provided special education and related services without parental consent.

(ii) If the hearing officer upholds the agency, the agency may evaluate or initially provide special education and related services to the child without the parent's consent, subject to the parent's rights under §§ 121a.510—121a.513.

(20 U.S.C. 1415(b)(1)(C), (D).)

Comment. 1. Any changes in a child's special education program, after the initial placement, are not subject to parental consent under Part B, but are subject to the prior notice requirement in paragraph (a) and the individualized education program requirements in Subpart C.

2. Paragraph (c) means that where State law requires parental consent before evaluation or before special education and related services are initially provided, and the parent refuses (or otherwise withholds) consent, State procedures, such as obtaining a court order authorizing the public agency to conduct the evaluation or provide the education and related services, must be followed.

If, however, there is no legal requirement for consent outside of these regulations, the public agency may use the due process procedures under this subpart to obtain a decision to allow the evaluation or services without parental consent. The agency must notify the parent of its actions, and the parent has appeal rights as well as rights at the hearing itself.

§ 121a.505 Content of notice.

(a) The notice under § 121a.504 must include:

(1) A full explanation of all of the procedural safeguards available to the parents under Subpart E;

(2) A description of the action proposed or refused by the agency, an explanation of why the agency proposes or refuses to take the action, and a description of any options the agency considered and the reasons why those options were rejected;

(3) A description of each evaluation procedure, test, record, or report the agency uses as a basis for the proposal or refusal; and

(4) A description of any other factors which are relevant to the agency's proposal or refusal.

(b) The notice must be:

(1) Written in language understandable to the general public, and

(2) Provided in the native language of the parent or other mode of communication used by the parent, unless it is clearly not feasible to do so.

(c) If the native language or other mode of communication of the parent is not a written language, the State or local educational agency shall take steps to insure:

(1) That the notice is translated orally or by other means to the parent in his or her native language or other mode of communication;

(2) That the parent understands the content of the notice, and

(3) That there is written evidence that the requirements in paragraph (c)(1) and (2) of this section have been met.

(20 U.S.C. 1415(b)(1)(D))

§ 121a.506 Impartial due process hearing.

(a) A parent or a public educational agency may initiate a hearing on any of the matters described in § 121a.504(a)(1) and (2).

(b) The hearing must be conducted by the State educational agency or the public agency directly responsible for the education of the child, as determined under State statute, State regulation, or a written policy of the State educational agency.

(c) The public agency shall inform the parent of any free or low-cost legal and other relevant services available in the area if:

(1) The parent requests the information; or

(2) The parent or the agency initiates a hearing under this section.

(20 U.S.C. 1416(b)(2).)

Comment: Many States have pointed to the success of using mediation as an intervening step prior to conducting a formal due process hearing. Although the process of mediation is not required by the statute or these regulations, an agency may wish to suggest mediation in disputes concerning the identification, evaluation, and educational placement of handicapped children, and the provision of a free appropriate public education to those children. Mediations have been conducted by members of State educational agencies or local educational agency personnel who were not previously involved in the particular case. In many cases, mediation leads to resolution of differences between parents and agencies without the development of an adversarial relationship and with minimal emotional stress. However, mediation may not be used to deny or delay a parent's rights under this subpart.

§ 121a.507 Impartial hearing officer.

(a) A hearing may not be conducted:

(1) By a person who is an employee of a public agency which is involved in the education or care of the child, or

(2) By any person having a personal or professional interest which would conflict with his or her objectivity in the hearing.

(b) A person who otherwise qualifies to conduct a hearing under paragraph (a) of this section is not an employee of the agency solely because he or she is paid by the agency to serve as a hearing officer.

(c) Each public agency shall keep a list of the persons who serve as hearing officers. The list must include a statement of the qualifications of each of those persons.

(20 U.S.C. 1414(b)(2).)

§ 121a.508 Hearing rights.

(a) Any party to a hearing has the right to:

(1) Be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of handicapped children;

(2) Present evidence and confront, cross-examine, and compel the attendance of witnesses;

(3) Prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least five days before the hearing;

(4) Obtain a written or electronic verbatim record of the hearing;

(5) Obtain written findings of fact and decisions. (The public agency shall transmit those findings and decisions, after deleting any personally identifiable information, to the State advisory panel established under Subpart F).

(b) Parents involved in hearings must be given the right to:

(1) Have the child who is the subject of the hearing present; and

(2) Open the hearing to the public.

(20 U.S.C. 1415(d).)

§ 121a.509 Hearing decision; appeal.

A decision made in a hearing conducted under this subpart is final, unless

a party to the hearing appeals the decision under § 121a.510 or § 121a.511.

(20 U.S.C. 1415(c).)

§ 121a.510 Administrative appeal; impartial review.

(a) If the hearing is conducted by a public agency other than the State educational agency, any party aggrieved by the findings and decision in the hearing may appeal to the State educational agency.

(b) If there is an appeal, the State educational agency shall conduct an impartial review of the hearing. The official conducting the review shall:

(1) Examine the entire hearing record;

(2) Insure that the procedures at the hearing were consistent with the requirements of due process;

(3) Seek additional evidence if necessary. If a hearing is held to receive additional evidence, the rights in § 121a.508 apply;

(4) Afford the parties an opportunity for oral or written argument, or both, at the discretion of the reviewing official;

(5) Make an independent decision on completion of the review; and

(6) Give a copy of written findings and the decision to the parties.

(c) The decision made by the reviewing official is final, unless a party brings a civil action under § 121a.512.

(20 U.S.C. 1415 (c), (d); H. Rep. No. 94-664, at p. 49 (1975).)

Comment. 1. The State educational agency may conduct its review either directly or through another State agency acting on its behalf. However, the State educational agency remains responsible for the final decision on review.

2. All parties have the right to continue to be represented by counsel at the State administrative review level, whether or not the reviewing official determines that a further hearing is necessary. If the reviewing official decides to hold a hearing to receive additional evidence, the other rights in section 121a.508, relating to hearings, also apply.

§ 121a.511 Civil action.

Any party aggrevied by the findings and decision made in a hearing who does not have the right to appeal under § 121a.510 of this subpart, and any party aggrieved by the decision of a reviewing officer under § 121a.510 has the right to bring a civil action under section 615(e)(2) of the Act.

(20 U.S.C. 1415.)

§ 121a.512 Timeliness and convenience of hearings and reviews.

(a) The public agency shall insure that not later than 45 days after the receipt of a request for a hearing:

(1) A final decision is reached in the hearing; and

(2) A copy of the decision is mailed to each of the parties.

(b) The State educational agency shall insure that not later than 30 days after the receipt of a request for a review:

(1) A final decision is reached in the review; and

(2) A copy of the decision is mailed to each of the parties.

(c) A hearing or reviewing officer may grant specific extensions of time beyond the periods set out in paragraphs (a) and (b) of this section at the request of either party.

(d) Each hearing and each review involving oral arguments must be conducted at a time and place which is reasonably convenient to the parents and child involved.

(20 U.S.C. 1415.)

§ 121a.513 Child's status during proceedings.

(a) During the pendency of any administrative or judicial proceeding regarding a complaint, unless the public agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her present educational placement.

(b) If the complaint involves an application for initial admission to public school, the child, with the consent of the parents, must be placed in the public school program until the completion of all the proceedings.

(20 U.S.C. 1415(e)(3).)

Comment. Section 121a.513 does not permit a child's placement to be changed during a complaint proceeding, unless the parents and agency agree otherwise. While the placement may not be changed, this does not preclude the agency from using its normal procedures for dealing with children who are endangering themselves or others.

§ 121a.514 Surrogate parents.

(a) *General.* Each public agency shall insure that the rights of a child are protected when:

(1) No parent (as defined in § 121a.10) can be identified;

(2) The public agency, after reasonable efforts, cannot discover the whereabouts of a parent; or

(3) The child is a ward of the State under the laws of that State.

(b) *Duty of public agency.* The duty of a public agency under paragraph (a) of this section includes the assignment of an individual to act as a surrogate for the parents. This must include a method (1) for determining whether a child needs a surrogate parent, and (2) for assigning a surrogate parent to the child.

(c) *Criteria for selection of surrogates.* (1) The public agency may select a surrogate parent in any way permitted under State law.

(2) Public agencies shall insure that a person selected as a surrogate:

(i) Has no interest that conflicts with the interests of the child he or she represents; and

(ii) Has knowledge and skills, that insure adequate representation of the child.

(d) *Non-employee requirement; compensation.* (1) A person assigned as a surrogate may not be an employee of a public agency which is involved in the education or care of the child.

(2) A person who otherwise qualifies to be a surrogate parent under paragraph (c) and (d)(1) of this section, is not an employee of the agency solely because he or she is paid by the agency to serve as a surrogate parent.

(e) *Responsibilities.* The surrogate parent may represent the child in all matters relating to:

(1) The identification, evaluation, and educational placement of the child, and

(2) The provision of a free appropriate public education to the child.

(20 U.S.C. 1415(b)(1)(B).)

PROTECTION IN EVALUATION PROCEDURES

§ 121a.530 General.

(a) Each State educational agency shall insure that each public agency establishes and implements procedures which meet the requirements of §§ 121a.530–121a.534.

(b) Testing and evaluation materials and procedures used for the purposes of evaluation and placement of handicapped children must be selected and administered so as not to be racially or culturally discriminatory.

(20 U.S.C. 1412(5)(C).)

§ 121a.531 Preplacement evaluation.

Before any action is taken with respect to the initial placement of a handicapped child in a special education program, a full and individual evaluation of the child's educational needs must be conducted in accordance with the requirements of § 121a.532.

(20 U.S.C. 1412(5)(C).)

§ 121a.532 Evaluation procedures.

State and local educational agencies shall insure, at a minimum, that:

(a) Tests and other evaluation materials:

(1) Are provided and administered in the child's native language or other mode of communication, unless it is clearly not feasible to do so;

(2) Have been validated for the specific purpose for which they are used; and

(3) Are administered by trained personnel in conformance with the instructions provided by their producer;

(b) Tests and other evaluation materials include those tailored to assess specific areas of educational need and not merely those which are designed to provide a single general intelligence quotient;

(c) Tests are selected and administered so as best to ensure that when a test is administered to a child with impaired sensory, manual, or speaking skills, the test results accurately reflect the child's aptitude or achievement level or whatever other factors the test purports to measure, rather than reflecting the child's impaired sensory, manual, or speaking skills (except where those

skills are the factors which the test purports to measure);

(d) No single procedure is used as the sole criterion for determining an appropriate educational program for a child; and

(e) The evaluation is made by a multidisciplinary team or group of persons, including at least one teacher or other specialist with knowledge in the area of suspected disability.

(f) The child is assessed in all areas related to the suspected disability, including, where appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities.

(20 U.S.C. 1412(5)(C).)

Comment. Children who have a speech impairment as their primary handicap may not need a complete battery of assessments (e.g., psychological, physical, or adaptive behavior). However, a qualified speech-language pathologist would (1) evaluate each speech impaired child using procedures that are appropriate for the diagnosis and appraisal of speech and language disorders, and (2) where necessary, make referrals for additional assessments needed to make an appropriate placement decision.

§ 121a.533 Placement procedures.

(a) In interpreting evaluation data and in making placement decisions, each public agency shall:

(1) Draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior;

(2) Insure that information obtained from all of these sources is documented and carefully considered;

(3) Insure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and

(4) Insure that the placement decision is made in conformity with the least restrictive environment rules in §§ 121a.550–121a.554.

(b) If a determination is made that a child is handicapped and needs special education and related services, an individualized education program must be developed for the child in accordance with §§ 121a.340–121a.349 of Subpart C.

(20 U.S.C. 1412(5)(C); 1414(a)(5).)

Comment. Paragraph (a)(1) includes a list of examples of sources that may be used by a public agency in making placement decisions. The agency would not have to use all the sources in every instance. The point of the requirement is to insure that more than one source is used in interpreting evaluation data and in making placement decisions. For example, while all of the named sources would have to be used for a child whose suspected disability is mental retardation, they would not be necessary for certain other handicapped children, such as a child who has a severe articulation disorder as his primary handicap. For such a child, the speech-language pathologist, in complying with the multisource requirement, might use (1) a standardized test of articulation, and (2) observation of the child's articulation behavior in conversational speech.

§ 121a.534 Reevaluation.

Each State and local educational agency shall insure:

(a) That each handicapped child's individualized education program is reviewed in accordance with §§ 121a.340–121a.349 of Subpart C, and

(b) That an evaluation of the child, based on procedures which meet the requirements under § 121a.532, is conducted every three years or more frequently if conditions warrant or if the child's parent or teacher requests an evaluation.

(20 U.S.C. 1412(5)(c).)

LEAST RESTRICTIVE ENVIRONMENT

§ 121a.550 General.

(a) Each State educational agency shall insure that each public agency establishes and implements procedures which meet the requirements of §§ 121a.550–121a.556.

(b) Each public agency shall insure:

(1) That to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and

(2) That special classes, separate schooling or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

(20 U.S.C. 1412(5)(B); 1414(a)(1)(C)(iv).)

§ 121a.551 Continuum of alternative placements.

(a) Each public agency shall insure that a continuum of alternative placements is available to meet the needs of handicapped children for special education and related services.

(b) The continuum required under paragraph (a) of this section must:

(1) Include the alternative placements listed in the definition of special education under § 121a.13 of Subpart A (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions), and

(2) Make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement.

(20 U.S.C. 1412(5)(B).)

§ 121a.552 Placements.

Each public agency shall insure that:

(a) Each handicapped child's educational placement:

(1) Is determined at least annually,

(2) Is based on his or her individualized education program, and

(3) Is as close as possible to the child's home;

(b) The various alternative placements included under § 121a.551 are available to the extent necessary to implement the individualized education program for each handicapped child;

(c) Unless a handicapped child's individualized education program requires some other arrangement, the child is educated in the school which he or she would attend if not handicapped; and

(d) In selecting the least restrictive environment, consideration is given to any potential harmful effect on the child or on the quality of services which he or she needs.

(20 U.S.C. 1412(5)(B).)

Comment. Section 121a.552 includes some of the main factors which must be considered in determining the extent to which a handicapped child can be educated with children who are not handicapped. The overriding rule in this section is that placement decisions must be made on an individual basis. The section also requires each agency to have various alternative placements available in order to insure that each handicapped child receives an education which is appropriate to his or her individual needs.

The analysis of the regulations for Section 504 of the Rehabilitation Act of 1973 (45 CFR Part 84—Appendix, Paragraph 24) includes several points regarding educational placements of handicapped children which are pertinent to this section:

1. With respect to determining proper placements, the analysis states: "* * * it should be stressed that, where a handicapped child is so disruptive in a regular classroom that the education of other students is significantly impaired, the needs of the handicapped child cannot be met in that environment. Therefore regular placement would not be appropriate to his or her needs * * *."

2. With respect to placing a handicapped child in an alternate setting, the analysis states that among the factors to be considered in placing a child is the need to place the child as close to home as possible. Recipients are required to take this factor into account in making placement decisions. The parent's right to challenge the placement of their child extends not only to placement in special classes or separate schools, but also to placement in a distant school, particularly in a residential program. An equally appropriate education program may exist closer to home; and this issue may be raised by the parent under the due process provisions of this subpart.

§ 121a.553 Nonacademic settings.

In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, and the services and activities set forth in § 121a.306 of Subpart C, each public agency shall insure that each handicapped child participates with nonhandicapped children in those services and activities to the maximum extent appropriate to the needs of that child.

(20 U.S.C. 1412(5)(B).)

Comment. Section 121a.553 is taken from a new requirement in the final regulations for Section 504 of the Rehabilitation Act of 1973. With respect to this requirement, the analysis of the Section 504 Regulations includes the following statement: "[A new paragraph] specifies that handicapped children must also be provided nonacademic services in as integrated a setting as possible. This requirement is especially important for children whose educational needs necessitate their being solely with other handicapped children during most of each day. To the maximum extent appropriate, children in residential settings are also to be provided

opportunities for participation with other children." (45 CFR Part 84—Appendix, Paragraph 24.)

§ 121a.554 Children in public or private institutions.

Each State educational agency shall make arrangements with public and private institutions (such as a memorandum of agreement or special implementation procedures) as may be necessary to insure that § 121a.550 is effectively implemented.

(20 U.S.C. 1412(5)(B).)

Comment. Under section 612(5)(B) of the statute, the requirement to educate handicapped children with nonhandicapped children also applies to children in public and private institutions or other care facilities. Each State educational agency must insure that each applicable agency and institution in the State implements this requirement. Regardless of other reasons for institutional placement, no child in an institution who is capable of education in a regular public school setting may be denied access to an education in that setting.

§ 121a.555 Technical assistance and training activities.

Each State educational agency shall carry out activities to insure that teachers and administrators in all public agencies:

(a) Are fully informed about their responsibilities for implementing § 121a.550, and

(b) Are provided with technical assistance and training necessary to assist them in this effort.

(20 U.S.C. 1412(5)(B).)

§ 121a.556 Monitoring activities.

(a) The State educational agency shall carry out activities to insure that § 121a.550 is implemented by each public agency.

(b) If there is evidence that a public agency makes placements that are inconsistent with § 121a.550 of this subpart, the State educational agency:

(1) Shall review the public agency's justification for its actions, and

(2) Shall assist in planning and implementing any necessary corrective action.

(20 U.S.C. 1412(5)(B).)

CONFIDENTIALITY OF INFORMATION

§ 121a.560 Definitions.

As used in this subpart:

"Destruction" means physical destruction or removal of personal identifiers from information so that the information is no longer personally identifiable.

"Education records" means the type of records covered under the definition of "education records" in Part 99 of this title (the regulations implementing the Family Educational Rights and Privacy Act of 1974).

"Participating agency" means any agency or institution which collects, maintains, or uses personally identifiable information, or from which information is obtained, under this part.

(20 U.S.C. 1412(2)(D); 1417(c).)

§ 121a.561 Notice to parents.

(a) The State educational agency shall give notice which is adequate to fully inform parents about the requirements under § 121a.128 of Subpart B, including:

(1) A description of the extent to which the notice is given in the native languages of the various population groups in the State;

(2) A description of the children on whom personally identifiable information is maintained, the types of information sought, the methods the State intends to use in gathering the information (including the sources from whom information is gathered), and the uses to be made of the information;

(3) A summary of the policies and procedures which participating agencies must follow regarding storage, disclosure to third parties, retention, and destruction of personally identifiable information; and

(4) A description of all of the rights of parents and children regarding this information, including the rights under section 438 of the General Education Provisions Act and Part 99 of this title (the Family Educational Rights and Privacy Act of 1974, and implementing regulations).

(b) Before any major identification, location, or evaluation activity, the notice must be published or announced in newspapers or other media, or both, with circulation adequate to notify parents throughout the State of the activity.

(20 U.S.C. 1412(2)(D); 1417(c).)

§ 121a.562 Access rights.

(a) Each participating agency shall permit parents to inspect and review any education records relating to their children which are collected, maintained, or used by the agency under this part. The agency shall comply with a request without unnecessary delay and before any meeting regarding an individualized education program or hearing relating to the identification, evaluation, or placement of the child, and in no case more than 45 days after the request has been made.

(b) The right to inspect and review education records under this section includes:

(1) The right to a response from the participating agency to reasonable requests for explanations and interpretations of the records;

(2) The right to request that the agency provide copies of the records containing the information if failure to provide those copies would effectively prevent the parent from exercising the right to inspect and review the records; and

(3) The right to have a representative of the parent inspect and review the records.

(c) An agency may presume that the parent has authority to inspect and review records relating to his or her child unless the agency has been advised that the parent does not have the authority under applicable State law governing such matters as guardianship, separation, and divorce.

(20 U.S.C. 1412(2)(D); 1417(c).)

§ 121a.563 Record of access.

Each participating agency shall keep a record of parties obtaining access to education records collected, maintained, or used under this part (except access by parents and authorized employees of the participating agency), including the name of the party, the date access was given, and the purpose for which the party is authorized to use the records.

(20 U.S.C. 1412(2)(D); 1417(c).)

§ 121a.564 Records on more than one child.

If any education record includes information on more than one child, the parents of those children shall have the right to inspect and review only the information relating to their child or to be informed of that specific information.

(20 U.S.C. 1412(2)(D); 1417(c).)

§ 121a.565 List of types and locations of information.

Each participating agency shall provide parents on request a list of the types and locations of education records collected, maintained, or used by the agency.

(20 U.S.C. 1412(2)(D); 1417(c).)

§ 121a.566 Fees.

(a) A participating education agency may charge a fee for copies of records which are made for parents under this part if the fee does not effectively prevent the parents from exercising their right to inspect and review those records.

(b) A participating agency may not charge a fee to search for or to retrieve information under this part.

(20 U.S.C. 1412(2)(D); 1417(c).)

§ 121a.567 Amendment of records at parent's request.

(a) A parent who believes that information in education records collected, maintained, or used under this part is inaccurate or misleading or violates the privacy or other rights of the child, may request the participating agency which maintains the information to amend the information.

(b) The agency shall decide whether to amend the information in accordance with the request within a reasonable period of time of receipt of the request.

(c) If the agency decides to refuse to amend the information in accordance with the request it shall inform the parent of the refusal, and advise the parent of the right to a hearing under § 121a.568.

(20 U.S.C. 1412(2)(D); 1417(c).)

§ 121a.568 Opportunity for a hearing.

The agency shall, on request, provide an opportunity for a hearing to challenge information in education records to insure that it is not inaccurate, misleading,

or otherwise in violation of the privacy or other rights of the child.

(20 U.S.C. 1412(2)(D); 1417(c).)

§ 121a.569 Result of hearing.

(a) If, as a result of the hearing, the agency decides that the information is inaccurate, misleading or otherwise in violation of the privacy or other rights of the child, it shall amend the information accordingly and so inform the parent in writing.

(b) If, as a result of the hearing, the agency decides that the information is not inaccurate, misleading, or otherwise in violation of the privacy or other rights of the child, it shall inform the parent of the right to place in the records it maintains on the child a statement commenting on the information or setting forth any reasons for disagreeing with the decision of the agency.

(c) Any explanation placed in the records of the child under this section must:

(1) Be maintained by the agency as part of the records of the child as long as the record or contested portion is maintained by the agency; and

(2) If the records of the child or the contested portion is disclosed by the agency to any party, the explanation must also be disclosed to the party.

(20 U.S.C. 1412(2)(D); 1417(c).)

§ 121a.570 Hearing procedures.

A hearing held under § 121a.568 of this subpart must be conducted according to the procedures under § 99.22 of this title.

(20 U.S.C. 1412(2)(D); 1417(c).)

§ 121a.571 Consent.

(a) Parental consent must be obtained before personally identifiable information is:

(1) Disclosed to anyone other than officials of participating agencies collecting or using the information under this part, subject to paragraph (b) of this section; or

(2) Used for any purpose other than meeting a requirement under this part.

(b) An educational agency or institution subject to Part 99 of this title may not release information from education records to participating agencies without parental consent unless authorized to do so under Part 99 of this title.

(c) The State educational agency shall include policies and procedures in its annual program plan which are used in the event that a parent refuses to provide consent under this section.

(20 U.S.C. 1412(2)(D); 1417(c).)

§ 121a.572 Safeguards.

(a) Each participating agency shall protect the confidentiality of personally identifiable information at collection, storage, disclosure, and destruction stages.

(b) One official at each participating agency shall assume responsibility for insuring the confidentiality of any personally identifiable information.

(c) All persons collecting or using personally identifiable information must receive training or instruction regarding the State's policies and procedures under § 121a.129 of Subpart B and Part 99 of this title.

(d) Each participating agency shall maintain, for public inspection, a current listing of the names and positions of those employees within the agency who may have access to personally identifiable information.

(20 U.S.C. 1412(2)(D); 1417(c).)

§ 121a.573 Destruction of information.

(a) The public agency shall inform parents when personally identifiable information collected, maintained, or used under this part is no longer needed to provide educational services to the child.

(b) The information must be destroyed at the request of the parents. However, a permanent record of a student's name, address, and phone number, his or her grades, attendance record, classes attended, grade level completed, and year completed may be maintained without time limitation.

(20 U.S.C. 1412(2)(D); 1417(c).)

Comment. Under section 121a.573, the personally identifiable information on a handicapped child may be retained permanently unless the parents request that it be destroyed. Destruction of records is the best protection against improper and unauthorized disclosure. However, the records may be needed for other purposes. In informing parents about their rights under this section, the agency should remind them that the records may be needed by the child or the parents for social security benefits or other purposes. If the parents request that the information be destroyed, the agency may retain the information in pargraph (b).

§ 121a.574 Children's rights.

The State educational agency shall include policies and procedures in its annual program plan regarding the extent to which children are afforded rights of privacy similar to those afforded to parents, taking into consideration the age of the child and type or severity of disability.

(20 U.S.C. 1412(2)(D); 1417(c).)

Comment. Note that under the regulations for the Family Educational Rights and Privacy Act (45 CFR 99.4(a)), the rights of parents regarding education records are transferred to the student at age 18.

§ 121a.575 Enforcement.

The State educational agency shall describe in its annual program plan the policies and procedures, including sanctions, which the State uses to insure that its policies and procedures are followed and that the requirements of the Act and the regulations in this part are met.

(20 U.S.C. 1412(2)(D); 1417(c).)

§ 121a.576 Office of Education.

If the Office of Education or its authorized representatives collect any personally identifiable information regarding handicapped children which is not subject to 5 U.S.C. 552a (The Privacy Act of 1974), the Commissioner shall apply the requirements of 5 U.S.C. section 552a(b) (1)–(2), (4)–(11); (c); (d); (e)(1), (2), (3)(A), (B), and (D), (5)–(10); (h); (m); and (n), and the regulations implementing those provisions in Part 5b of this title.

(20 U.S.C. 1412(2)(D); 1417(c).)

OFFICE OF EDUCATION PROCEDURES

§ 121a.580 Opportunity for a hearing.

The Commissioner gives a State educational agency reasonable notice and an opportunity for a hearing before taking any of the following actions:

(a) Disapproval of a State's annual program plan under § 121a.113 of Subpart B.

(b) Withholding payments from a State under § 121a.590 or under section 434(c) of the General Education Provisions Act.

(c) Waiving the requirement under § 121a.589 of this subpart regarding supplementing and supplanting with funds provided under Part B of the Act.

(20 U.S.C. 1232c(c); 1413(a)(9)(B); 1413(c); 1416.)

§ 121a.581 Hearing panel.

The Commissioner appoints a Hearing Panel consisting of not less than three persons to conduct any hearing under § 121a.530 of this subpart.

(20 U.S.C. 1232c(c); 1413(a)(9)(B); 1413(c); 1416.)

§ 121a.582 Hearing procedures.

(a)(1) If the Hearing Panel determines that oral testimony would not materially assist the resolution of disputed facts, the Panel shall give each party an opportunity for presenting the case:

(i) In whole or in part in writing, or

(ii) In an informal conference before the Hearing Panel.

(2) The Hearing Panel shall give each party:

(i) Notice of the issues to be considered (if this notice has not already been given); and

(ii) An opportunity to be represented by counsel.

(b) If the Hearing Panel determines that oral testimony would materially assist the resolution of disputed facts, the Panel shall give each party, in addition to the requirements under paragraph (a)(2) of this section:

(1) An opportunity to obtain a record of the proceedings;

(2) An opportunity to present witnesses on the party's behalf; and

(3) An opportunity to cross-examine witnesses either orally or with written questions.

(20 U.S.C. 1232c(c); 1413(a)(9)(B); 1413(c); 1416.)

§ 121a.583 Initial decision; final decision.

(a) The Hearing Panel shall prepare an initial written decision which includes findings of fact and the conclusions based on those facts.

(b) The Hearing Panel shall mail a copy of the initial decision to each party (or to the party's counsel) and to the Commissioner, with a notice that each

party has an opportunity to submit written comments regarding the decision to the Commissioner within a specified reasonable time.

(c) The initial decision of the Hearing Panel is the final decision of the Commissioner unless, within 25 days after the end of the time for receipt of written comments, the Commissioner informs the Panel in writing that the decision is being reviewed.

(d) Review by the Commissioner is based on the decision, the written record, if any, of the Hearing Panel's proceedings, and written comments or oral arguments by the parties.

(e) No decision under this section becomes final until it is served on the State educational agency or its attorney.

(20 U.S.C. 1232c(c); 1413(a)(9)(b); 1413(c); 1416.)

§ 121a.589 Waiver of requirement regarding supplementing and supplanting with Part B funds.

(a) Under sections 613(a)(9)(B) and 614(a)(2)(B)(ii) of the Act, State and local Educational agencies must insure that Federal funds provided under Part B of the Act are used to supplement the level of State and local funds expended for the education of handicapped children, and in no case to supplant those State and local funds. Beginning with funds appropriated for fiscal year 1979 and for each following fiscal year, the nonsupplanting requirement only applies to funds allocated to local educational agencies. (See § 121a.372.)

(b) If the State provides clear and convincing evidence that all handicapped children have available to them a free appropriate public education, the Commissioner may waive in part the requirement under sections 613(a)(9)(B) and 614(a)(2)(B)(ii) of the Act if the Commissioner concurs with the evidence provided by the State.

(c) If a State wishes to request a waiver, it must inform the Commissioner in writing. The Commissioner then provides the State with a finance and membership report form which provides the basis for the request.

(d) In its request for a waiver, the State shall include the results of a special study made by the State to obtain evidence of the availability of a free appropriate public education to all handicapped children. The special study must include statements by a representative sample of organizations which deal with handicapped children, and parents and teachers of handicapped children, relating to the following areas:

(1) The adequacy and comprehensiveness of the State's system for locating, identifying, and evaluating handicapped children, and

(2) The cost to parents, if any, for education for children enrolled in public and private day schools, and in public and private residential schools and institutions, and

(3) The adequacy of the State's due process procedures.

(e) In its request for a waiver, the State shall include finance data relating to the availability of a free appropriate public education for all handicapped children, including:

(1) The total current expenditures for regular education programs and special education programs by function and by source of funds (State, local, and Federal) for the previous school year, and

(2) The full-time equivalent membership of students enrolled in regular programs and in special programs in the previous school year.

(f) The Commissioner considers the information which the State provides under paragraph (d) and (e) of this section, along with any additional information he may request, or obtain through on-site reviews of the State's education programs and records, to determine if all children have available to them a free appropriate public education, and if so, the extent of the waiver.

(g) The State may request a hearing under §§ 121a.580–121a.583 with regard to any final action by the Commissioner under this section.

(20 U.S.C. 1411(c)(3); 1413(a)(9)(B).)

§ 121a.590 Withholding payments.

(a) The Commissioner may make the following findings only after reasonable notice and an opportunity for a hearing under §§ 121a.580–121a.583 to the State educational agency involved (and to any local educational agency affected by any failure described in paragraph (a)(2) of this section):

(1) That there has been a failure to comply substantially with the provisions of section 612 and 613 of the Act, or

(2) That in the administration of the annual program plan there is a failure to comply with any provision of this part or with any requirement in the application of a local educational agency approved by the State educational agency under the annual program plan.

(b) After making either of the findings in paragraph (a) of this section, the Commissioner:

(1) Shall, after notifying the State educational agency, withhold any further payments to the State under this part, and

(2) May, after notifying the State educational agency, withhold further payments to the State under the Federal programs referred to in § 121a.139 of Subpart B which are within his jurisdiction, to the extent that funds under those programs are available for the provision of assistance for the education of handicapped children.

(c) If the Commissioner withholds payments under paragraph (b) of this section he may determine:

(1) That withholding is limited to programs or projects under the annual program plan, or portions of it, affected by the failure, or

(2) That the State educational agency must not make further payments under Part B of the Act to specified local educational agencies affected by the failure.

(20 U.S.C. 1416(a).)

§ 121a.591 Reinstating payments.

Until the Commissioner is satisfied that there is no longer any failure to comply with the provisions of this part, as specified in § 121a.590(a):

(a) No further payments shall be made to the State under this part or under the Federal programs specified in section 613(a)(2) of the Act which are within his jurisdiction to the extent that funds under those programs are available for the provision of assistance for the education of handicapped children, or

(b) Payments by the State educational agency under this part shall be limited to local educational agencies whose actions did not cause or were not involved in the failure.

(20 U.S.C. 1416(a).)

§ 121a.592 Public notice by State and local educational agencies.

Any State educational agency and local educational agency which receives a notice under § 121a.590(a) shall by means of a public notice, take any necessary measures to inform the public within the agency's jurisdiction of the pendency of the action.

(20 U.S.C. 1416(a).)

§ 121a.593 Judicial review of Commissioner's final action on annual program plan.

If any State is dissatisfied with the Commissioner's final action with respect to its annual program plan submitted under Subpart B, the State may under section 616(b) of the Act, within sixty days after notice of the action, file a petition for review of that action with the United States Court of Appeals for the circuit in which the State is located.

(20 U.S.C. 1416(b).)

Subpart F—State Administration

State Educational Agency Responsibilities: General

§ 121a.600 Responsibility for all educational programs.

(a) The State educational agency is responsible for insuring:

(1) That the requirements of this part are carried out; and

(2) That each educational program for handicapped children administered within the State, including each program administered by any other public agency:

(i) Is under the general supervision of the persons responsible for educational programs for handicapped children in the State educational agency, and

(ii) Meets education standards of the State educational agency (including the requirements of this part).

(b) The State must comply with paragraph (a) of this section through State statute, State regulation, signed agreement between respective agency officials, or other documents.

(20 U.S.C. 1412(6).)

Comment. The requirement in § 121a.600(a) is taken essentially verbatim from sec-

tion 612(6) of the statute and reflects the desire of the Congress for a central point of responsibility and accountability in the education of handicapped children within each State. With respect to State educational agency responsibility, the Senate Report on P.L. 94-142 includes the following statements:

This provision is included specifically to assure a single line of responsibility with regard to the education of handicapped children, and to assure that in the implementation of all provisions of this Act and in carrying out the right to education for handicapped children, the State educational agency shall be the responsible agency * * *.

Without this requirement, there is an abdication of responsibility for the education of handicapped children. Presently, in many States, responsibility is divided, depending upon the age of the handicapped child, sources of funding, and type of services delivered. While the Committee understands that different agencies may, in fact, deliver services, the responsibility must remain in a central agency overseeing the education of handicapped children, so that failure to deliver services or the violation of the rights of handicapped children is squarely the responsibility of one agency. (Senate Report No. 94-168, p. 24 (1975))

In meeting the requirements of this section, there are a number of acceptable options which may be adopted, including the following:

(1) Written agreements are developed between respective State agencies concerning State educational agency standards and monitoring. These agreements are binding on the local or regional counterparts of each State agency.

(2) The Governor's Office issues an administrative directive establishing the State educational agency responsibility.

(3) State law, regulation, or policy designates the State educational agency as responsible for establishing standards for all educational programs for the handicapped, and includes responsibility for monitoring.

(4) State law mandates that the State educational agency is responsible for all educational programs.

§ 121a.601 Monitoring and evaluation activities.

Each State educational agency shall:

(a) Undertake monitoring and evaluation activities to insure compliance of all public agencies within the State with the requirements of Subparts C, D, and E.

(b) Develop procedures (including specific timelines) for monitoring and evaluating public agencies involved in that education of handicapped children. These procedures must include:

(1) Collection of data and reports;

(2) Conduct of on-site visits;

(3) Audit of Federal fund utilization; and

(4) Comparison of a sampling of individualized education programs with the programs actually provided.

(20 U.S.C. 1412(6); 1413(a)(11).)

Comment: In carrying out the requirements of paragraph (b) of this section, State educational agencies could include additional procedures, such as involving parents or representatives of parent organizations in on-site visits and other monitoring activities.

§ 121a.602 Adoption of complaint procedures.

(a) Each State educational agency shall adopt effective procedures for reviewing, investigating, and acting on any allegations of substance, which may be made by public agencies, or private individuals, or organizations, of actions taken by any public agency that are contrary to the requirements of this part.

(b) In carrying out the requirements in paragraph (a) of this section, the State educational agency shall:

(1) Designate specific individuals within the agency who are responsible for implementing the requirements;

(2) Provide for negotiations, technical assistance activities, and other remedial action to achieve compliance; and

(3) Provide for the use of sanctions, including the withholding of Part B funds in accordance with § 121a.194

(20 U.S.C. 1412(6).)

Use of Funds

§ 121a.620 Federal funds for State administration.

A State may use five per cent of the total State allotment in any fiscal year under Part B of the Act, or $200,000, whichever is greater, for administrative costs related to carrying out sections 612 and 613 of the Act. However, this amount cannot be greater than the amount which the State may use under § 121a 704 or § 121a.705, as the case may be.

(20 U.S.C. 1411 (b), (c).)

§ 121a.621 Allowable costs.

(a) The State educational agency may use funds under § 121a.620 of this Subpart for:

(1) Administration of the annual program plan and for planning at the State level, including planning, or assisting in the planning, of programs or projects for the education of handicapped children;

(2) Approval, supervision, monitoring, and evaluation of the effectiveness of local programs and projects for the education of handicapped children;

(3) Technical assistance to local educational agencies with respect to the requirements of this part;

(4) Leadership services for the program supervision and management of special education activities for handicapped children; and

(5) Other State leadership activities and consultative services.

(b) The State educational agency shall use the remainder of its funds under § 121a.620 in accordance with § 121a.370 of Subpart C.

(20 U.S.C. 1411 (b), (c).)

State Advisory Panel

§ 121a.650 Establishment.

(a) Each State shall establish, in accordance with the provisions of this subpart, a State advisory panel on the education of handicapped children.

(b) The advisory panel must be appointed by the Governor or any other official authorized under State law to make those appointments.

(c) If a State has an existing advisory panel that can perform the functions in § 121a.652, the State may modify the existing panel so that it fulfills all of the requirements of this subpart, instead of establishing a new advisory panel.

(20 U.S.C. 1413(a)(12).)

§ 121a.651 Membership.

(a) The membership of the State advisory panel must be composed of persons involved in or concerned with the education of handicapped children. The membership must include at least one person representative of each of the following groups:

(1) Handicapped individuals.

(2) Teachers of handicapped children.

(3) Parents of handicapped children.

(4) State and local educational officials.

(5) Special education program administrators.

(b) The State may expand the advisory panel to include additional persons in the groups listed in paragraph (a) of this section and representatives of other groups not listed.

(20 U.S.C. 1413(a)(12).)

Comment. The membership of the State advisory panel, as listed in paragraphs (a)(1)-(5), is required in section 613(a)(12) of the Act. As indicated in paragraph (b), the composition of the panel and the number of members may be expanded at the discretion of the State. In adding to the membership, consideration could be given to having:

(1) An appropriate balance between professional groups and consumers (i.e., parents, advocates, and handicapped individuals);

(2) Broad representation within the consumer-advocate groups, to insure that the interests and points of view of various parents, advocates and handicapped individuals are appropriately represented;

(3) Broad representation within professional groups (e.g., (a) regular education personnel, (b) special educators, including teachers, teacher trainers, and administrators, who can properly represent various dimensions in the education of handicapped children, and (c) appropriate related services personnel); and

(4) Representatives from other State advisory panels (such as vocational education).

If a State elects to maintain a small advisory panel (e.g., 10-15 members), the panel itself could take steps to insure that it (1) consults with and receives inputs from various consumer and special interest professional groups, and (2) establishes committees for particular short-term purposes composed of representatives from those input groups.

§ 121a.652 Advisory panel functions.

The State advisory panel shall:

(a) Advise the State educational agency of unmet needs within the State in the education of handicapped children;

(b) Comment publicly on the State annual program plan and rules or regulations proposed for issuance by the

State regarding the education of handicapped children and the procedures for distribution of funds under this part; and

(c) Assist the State in developing and reporting such information and evaluations as may assist the Commissioner in the performance of his responsibilities under section 618.

(20 U.S.C. 1413(a)(12).)

§ 121a.653 Advisory panel procedures.

(a) The advisory panel shall meet as often as necessary to conduct its business.

(b) By July 1 of each year, the advisory panel shall submit an annual report of panel activities and suggestions to the State educational agency. This report must be made available to the public in a manner consistent with other public reporting requirements under this part.

(c) Official minutes must be kept on all panel meetings and shall be made available to the public on request.

(d) All advisory panel meetings and agenda items must be publicly announced prior to the meeting, and meetings must be open to the public.

(e) Interpreters and other necessary services must be provided at panel meetings for panel members or participants. The State may pay for these services from funds under § 121a.620.

(f) The advisory panel shall serve without compensation but the State must reimburse the panel for reasonable and necessary expenses for attending meetings and performing duties. The State may use funds under § 121a.620 for this purpose.

(20 U.S.C. 1413(a)(12).)

Subpart G—Allocation of Funds; Reports

Allocations

§ 121a.700 Special definition of the term State.

For the purposes of § 121a.701, § 121a.702, and §§ 121a.704–121a.708, the term "State" does not include Guam, American Samoa, the Virgin Islands, and the Trust Territory of the Pacific Islands.

(20 U.S.C. 1411(a)(2).)

§ 121a.701 State entitlement; formula.

(a) The maximum amount of the grant to which a State is entitled under section 611 of the Act in any fiscal year is equal to the number of handicapped children aged three through 21 in the State who are receiving special education and related services, multiplied by the applicable percentage, under paragraph (b) of this section, of the average per pupil expenditure in public elementary and secondary schools in the United States.

(b) For the purposes of the formula in paragraph (a) of this section, the applicable percentage of the average per pupil expenditure in public elementary and secondary schools in the United States for each fiscal year is:

(1) 1978—5 percent,

(2) 1979—10 percent,

(3) 1980—20 percent,

(4) 1981—30 percent, and

(5) 1982, and for each fiscal year after 1982, 40 percent.

(20 U.S.C. 1411(a)(1).)

(c) For the purposes of this section, the average per pupil expenditure in public elementary and secondary schools in the United States, means the aggregate expenditures during the second fiscal year preceding the fiscal year for which the computation is made (or if satisfactory data for that year are not available at the time of computation, then during the most recent preceding fiscal year for which satisfactory data are available) of all local educational agencies in the United States (which, for the purpose of this section, means the fifty States and the District of Columbia), plus any direct expenditures by the State for operation of those agencies (without regard to the source of funds from which either of those expenditures are made), divided by the aggregate number of children in average daily attendance to whom those agencies provided free public education during that preceding year.

(20 U.S.C. 1411(a)(4).)

§ 121a.702 Limitations and exclusions.

(a) In determining the amount of a grant under § 121a.701 of this subpart, the Commissioner may not count:

(1) Handicapped children in a State to the extent that the number of those children is greater than 12 percent of the number of all children aged five through 17 in the State;

(2) Children with specific learning disabilities to the extent that the number of those children is greater than two percent of the number of all children aged five through 17 in the State; and

(3) Handicapped children who are counted under section 121 of the Elementary and Secondary Education Act of 1965.

(b) For the purposes of paragraph (a) of this section, the number of children aged five through 17 in any State shall be determined by the Commissioner on the basis of the most recent satisfactory data available to him.

(20 U.S.C. 1411(a)(5).)

§ 121a.703 Ratable reductions.

(a) *General.* If the sums appropriated for any fiscal year for making payments to States under section 611 of the Act are not sufficient to pay in full the total amounts to which all States are entitled to receive for that fiscal year, the maximum amount which all States are entitled to receive for that fiscal year shall be ratably reduced. In case additional funds become available for making payments for any fiscal year during which the preceding sentence is applicable, those reduced amounts shall be increased on the same basis they were reduced.

(20 U.S.C. 1411(g)(1).)

(b) *Reporting dates for local educational agencies and reallocations.*

(1) In any fiscal year in which the State entitlements have been ratably reduced, and in which additional funds have not been made available to pay in full the total of the amounts under paragraph (a) of this section, the State educational agency shall fix dates before which each local educational agency shall report to the State the amount of funds available to it under this part which it estimates it will expend.

(2) The amounts available under paragraph (a)(1) of this section, or any amount which would be available to any other local educational agency if it were to submit an application meeting the requirements of this part, which the State educational agency determines will not be used for the period of its availability, shall be available for allocation to those local educational agencies, in the manner provided in §121a.707, which the State educational agency determines will need and be able to use additional funds to carry out approved programs.

(20 U.S.C. 1411(g)(2).)

§ 121a.704 Hold harmless provision.

No State shall receive less than the amount it received under Part B of the Act for fiscal year 1977.

(20 U.S.C. 1411(a)(1).)

§ 121a.705 Within-State distribution: fiscal year 1978.

Of the funds received under § 121a.701 of this subpart by any State for fiscal year 1978:

(a) 50 percent may be used by the State in accordance with the provisions of § 121a.620 of Subpart F and § 121a.370 of Subpart C, and

(b) 50 percent shall be distributed to local educational agencies in the State in accordance with § 121a.707.

(20 U.S.C. 1411(b)(1).)

§ 121a.706 Within-State distribution: fiscal year 1979 and after.

Of the funds received under § 121a.701 by any State for fiscal year 1979, and for each fiscal year after fiscal year 1979:

(a) 25 percent may be used by the State in accordance with § 121a.620 of Subpart F and § 121a.370 of Subpart C, and

(b) 75 percent shall be distributed to the local educational agencies in the State in accordance with § 121a.707.

(20 U.S.C. 1411(c)(1).)

§ 121a.707 Local educational agency entitlements; formula.

From the total amount of funds available to all local educational agencies, each local educational agency is entitled to an amount which bears the same ratio to the total amount as the number of handicapped children aged three through 21 in that agency who are receiving special education and related services bears to the aggregate number of handicapped children aged three through 21 receiving special education and related services in all local educational agencies which apply to the State educational agency for funds under Part B of the Act.

(20 U.S.C. 1411(d).)

§ 121a.708 Reallocation of local educational agency funds.

If a State educational agency determines that a local educational agency is adequately providing a free appropriate public education to all handicapped children residing in the area served by the local agency with State and local funds otherwise available to the local agency, the State educational agency may reallocate funds (or portions of those funds which are not required to provide special education and related services) made available to the local agency under § 121a.707, to other local educational agencies within the State which are not adequately providing special education and related services to all handicapped children residing in the areas served by the other local educational agencies.

(20 U.S.C. 1414(e).)

§ 121a.709 Payments to Secretary of Interior.

(a) The Commissioner is authorized to make payments to the Secretary of the Interior according to the need for that assistance for the education of handicapped children on reservations serviced by elementary and secondary schools operated for Indian children by the Department of the Interior.

(b) The amount of those payments for any fiscal year shall not exceed one percent of the aggregate amounts available to all States for that fiscal year under Part B of the Act.

(20 U.S.C. 1411(f)(1).)

§ 121a.710 Entitlements to jurisdictions.

(a) The jurisdictions to which this section applies are Guam, American Samoa, the Virgin Islands, and the Trust Territory of the Pacific Islands.

(b) Each jurisdiction under paragraph (a) of this section is entitled to a grant for the purposes set forth in section 601 (c) of the Act. The amount to which those jurisdictions are so entitled for any fiscal year shall not exceed an amount equal to 1 percent of the aggregate of the amounts available to all States under this part for that fiscal year. Funds appropriated for those jurisdictions shall be allocated proportionately among them on the basis of the number of children aged three through twenty-one in each jurisdiction. However, no jurisdiction shall receive less than $150,000, and other allocations shall be ratably reduced if necessary to insure that each jurisdiction receives at least that amount.

(c) The amount expended for administration by each jurisdiction under this section shall not exceed 5 percent of the amount allotted to the jurisdiction for any fiscal year, or $35,000, whichever is greater.

(20 U.S.C. 1411(e).)

REPORTS

§ 121a.730 Annual report of children served—report requirement.

(a) The State educational agency shall report to the Commissioner no later than April 1 of each year the number of handicapped children aged three through 21 residing in the State who are receiving special education and related services.

(b) The State educational agency shall submit the report on forms provided by the Commissioner.

(20 U.S.C. 1411(a)(3).)

Comment. It is very important to understand that this report and the requirements that relate to it are solely for allocation purposes. The population of children the State may count for allocation purposes may differ from the population of children to whom the State must make available a free appropriate public education. For example, while section 611(a)(5) of the Act limits the number of children who may be counted for allocation purposes to 12 percent of the general school population aged five through seventeen, a State might find that 14 percent (or some other percentage) of its children are handicapped. In that case, the State must make free appropriate public education available to all of those handicapped children.

§ 121a.751 Annual report of children served—information required in the report.

(a) In its report, the State educational agency shall include a table which shows:

(1) The number of handicapped children receiving special education and related services on October 1 and on February 1 of that school year, and the average of the numbers for those two dates;

(2) The number of those handicapped children within each disability category, as defined in the definition of "handicapped children" in § 121a.5 of Subpart A; and

(3) The number of those handicapped children within each of the following age groups:

(i) Three through five;

(ii) Six through seventeen; and

(iii) Eighteen through twenty-one.

(b) A child must be counted as being in the age group corresponding to his or her age on the date of the count: October 1 or February 1, as the case may be.

(c) The State educational agency may not report a child under more than one disability category.

(d) If a handicapped child has more than one disability, the State educational agency shall report that child in accordance with the following procedure:

(1) A child who is both deaf and blind must be reported as "deaf-blind."

(2) A child who has more than one disability (other than a deaf-blind child) must be reported as "multihandicapped."

(20 U.S.C. 1411(a)(3); 1411(a)(5)(A)(ii); 1418(b).)

§ 121a.752 Annual report of children served—certification.

The State educational agency shall include in its report a certification signed by an authorized official of the agency that the information provided is an accurate and unduplicated count of handicapped children receiving special education and related services on the dates in question.

(20 U.S.C. 1411(a)(3); 1417(b).)

§ 121a.753 Annual report of children served—criteria for counting children.

(a) The State educational agency may include handicapped children in its report who are enrolled in a school or program which is operated or supported by a public agency, and which either:

(1) Provides them with both special education and related services; or

(2) Provides them only with special education if they do not need related services to assist them in benefitting from that special education.

(b) The State educational agency may not include handicapped children in its report who:

(1) Are not enrolled in a school or program operated or supported by a public agency;

(2) Are not provided special education that meets State standards;

(3) Are not provided with a related service that they need to assist them in benefitting from special education;

(4) Are counted by a State agency under section 121 of the Elementary and Secondary Education Act of 1965, as amended; or

(5) Are receiving special education funded solely by the Federal Government. However, the State may count children covered under § 121a. 186(b) of Subpart B.

(20 U.S.C. 1411(a)(3); 1417(b).)

Comment. 1. Under paragraph (a), the State may count handicapped children in a Head Start or other preschool program operated or supported by a public agency if those children are provided special education that meets State standards.

2. "Special education," by statutory definition, must be at no cost to parents. As of September 1, 1978, under the free appropriate public education requirement, both special education and related services must be at no cost to parents.

There may be some situations, however, where a child receives special education from a public source at no cost, but whose parents pay for the basic or regular education. This child may be counted. The Office of Education expects that there would only be limited situations where special education would be clearly separate from regular education—generally, where speech therapy is the only special education required by the child. For example, the child might be in a regular program in a parochial or other private school but receiving speech therapy in a program funded by the local educational agency. Allowing these children to be counted will provide incentives (in addition to complying with the legal requirement in section 613(a)(4)(A) of the Act regarding private schools) to public agencies to provide services to children in private schools, since funds are generated in part on the basis of the number of children provided special education and related services. Agencies should understand, however, that where a handicapped child is placed in or referred to a public or private school for educational purposes, special education includes the entire educational program provided to the child. In that case, parents may not be charged for any part of the child's education.

A State may not count Indian children on or near reservations and children on military facilities if it provides them no special

education. If a State or local educational agency is responsible for serving these children, and does provide them special education and related services, they may be counted.

§ 121a.754 Annual report of children served—other responsibilities of the State educational agency.

In addition to meeting the other requirements in this subpart, the State educational agency shall:

(a) Establish procedures to be used by local educational agencies and other educational institutions in counting the number of handicapped children receiving special education and related services;

(b) Set dates by which those agencies and institutions must report to the State educational agency to insure that the State complies with § 121a.750(a);

(c) Obtain certification from each agency and institution that an unduplicated and accurate count has been made;

(d) Aggregate the data from the count obtained from each agency and institution, and prepare the reports required under this subpart; and

(e) Insure that documentation is maintained which enables the State and the Commissioner to audit the accuracy of the count.

(20 U.S.C. 1411(a)(3); 1417(b).)

Comment. States should note that the data required in the annual report of children served are not to be transmitted to the Commissioner in personally identifiable form. States are encouraged to collect these data in non-personally identifiable form.

APPENDIX A—ANALYSIS OF FINAL REGULATION (45 CFR PART 121a) UNDER PART B OF THE EDUCATION OF THE HANDICAPPED ACT

These regulations set forth requirements to be followed by States and localities if they are to receive funds under Part B of the Education of the Handicapped Act. The regulations cover matters such as the identification, location, and evaluation of handicapped children; the provision of free appropriate public education; the establishment of a full educational opportunity goal; the count of handicapped children for allocation purposes; priorities in the use of Part B funds; the proper use of Part B funds; the development of an individualized education program; the creation of a comprehensive personnel development system; procedural safeguards (e.g. right to notice and conduct of hearings); methods to guarantee public participation; and details about State annual program plans and local educational agency applications.

RELATIONSHIP BETWEEN REGULATIONS UNDER PART B AND REGULATIONS UNDER SECTION 504

The regulations under section 504 of the Rehabilitation Act of 1973 (45 CFR Part 84; published at 42 FR 22675; May 4, 1977) deal with nondiscrimination on the basis of handicap and basically require that recipients of Federal funds provide equal opportunities to handicapped persons (for example, that they meet the needs of handicapped persons to the same extent that the needs of nonhandicapped persons are met). Subpart D of the section 504 regulations ("Preschool, Elementary, and Secondary Education") contains requirements very similar to those in Part B of the Education of the Handicapped Act.

Basically, both require that handicapped persons be provided a free appropriate public education; that handicapped students be educated with nonhandicapped students to the extent appropriate; that educational agencies identify and locate all unserved handicapped children; that evaluation procedures be adopted to insure appropriate classification and educational services; and that procedural safeguards be established.

In several respects, however, the section 504 regulations are broader in coverage than Part B. For example, the definition of "handicapped person" and "qualified handicapped person" under section 504 covers a broader population than the definition of "handicapped children" under Part B. Under the Part B definition, a handicapped child is a child who has one of the impairments listed in the Act, who because of that impairment requires special education and related services. Under section 504, a handicapped person is a person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of that type of impairment, or is regarded as having that impairment (§ 84.3(j)).

The regulations for section 504 also deal with a number of subjects not covered by the Part B regulations (for example, barrier-free facilities and program accessibility; employment; postsecondary education and health, welfare and social services). On the other side, Part B contains a substantial number of administrative requirements not included under section 504 (for example, annual program plans and local applications) and requires more detailed procedures and policies in many instances (such as due process procedures).

In several instances, the section 504 regulations specifically reference where a requirement may be met by complying with a requirement under Part B. For example, § 84.33(b)(2), dealing with appropriate education, cites implementation of an individualized education program as one means of meeting the requirement. Section 84.33(d) has a September 1, 1978 outside date for providing an appropriate education to qualified handicapped persons (conforming to the timelines in Part B). Section 84.35(d) indicates that a reevaluation procedure consistent with the Part B requirements is one means of meeting the reevaluation requirements under section 504. Section 84.36, dealing with due process requirements, indicates that compliance with the procedural safeguards in Part B is one means of meeting those requirements.

It should be noted that the term "free appropriate public education" (FAPE) has different meanings under Part B and section 504. For example, under Part B, "FAPE" is a statutory term which requires special education and related services to be provided in accordance with an individualized education program. However, under section 504, each recipient must provide an education which includes "the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met * * *"

There is also a major difference between Part B and the section 504 regulations concerning the matter of exclusion of handicapped children from school. As of the effective date of the section 504 regulations (June 3, 1977), exclusion of handicapped children from school constitutes a violation of those requirements. However, under Part B, States are not required to serve all handicapped children aged 3–18 until September 1, 1978. As stated in Appendix A of the section 504 regulations:

The EHA requires a free appropriate education to be provided to handicapped children "no later than September 1, 1978," but section 504 contains no authority for delaying enforcement. To resolve this problem, a new paragraph (d) has been added to § 84.33. Section 84.33(d) requires recipients to achieve full compliance with the free appropriate public education requirements of § 84.33 as expeditiously as possible, but in no event later than September 1, 1978. The provision also makes clear that, as of the effective date of this regulation, no recipient may exclude a qualified handicapped child from its educational program. This provision against exclusion is consistent with the order of providing services set forth in section 612(3) of the EHA, which places the highest priority on providing services to handicapped children who are not receiving an education.

PART 121a—ASSISTANCE TO STATES FOR EDUCATION OF HANDICAPPED CHILDREN

SUBPART A—GENERAL

Subpart A sets forth the purposes and applicability of these regulations and includes definitions of statutory terms (e.g. free appropriate public education, special education, and related services) and other definitions related to those terms.

The following comments were received regarding Subpart A.

APPLICABILITY OF REGULATIONS TO STATE, LOCAL AND PRIVATE AGENCIES (§ 121a.2)

Comment: A commenter felt that the statement regarding the applicability of the regulations was not clear, and should be revised to indicate that the requirements apply to any public agency serving handicapped children, even if the agency does not receive Part B funds.

Response: A definition of "public agency" has been added to the regulations. The definition includes all political subdivisions in the State that are responsible for educating handicapped children. Throughout the regulation, the term "public agency" has been used to make it clear where the requirements do not apply only to State and local educational agencies. In addition, an explanatory comment was added after section 121a.2 to make it clear that the requirements under Part B are binding on each public agency in the State that has direct or delegated authority for the education of handicapped children, regardless of whether that agency receives Part B funds.

DEFINITIONS (§§ 121a.4–121a.15)

Comment: Hundreds of comments were received regarding definitions in the proposed rules. Commenters requested that new definitions be added, or sought changes in existing definitions, especially definitions of various disability categories and the various types of related services. In many instances, revisions were sought to conform to the most recent definitions adopted or used by professional associations.

Response: Definitions of terms used in the regulations are taken from various statutes, Congressional reports, or materials provided by professional associations and other groups. Where appropriate, the Office of Education has attempted to incorporate changes recommended by commenters, and has made other changes to clarify the definitions. In addition, the following new terms were added:

Definitions of "deaf-blind" and "multi-handicapped" were added because these are recognized categories of handicapped children in most States.

A definition of "qualified" was added in order to be able to use a consistent term in

referring to the qualifications of the various personnel.

The definition of "handicapped children" has been modified only by making certain clarifying changes. Although some commenters requested additional changes in the definitions of the various disability categories, it is felt that the definitions in this regulation must closely conform to current usage in the States and professions.

The related services definition was expanded to include "school health services." In addition, changes were made in the definitions of the individual terms included under "related services" (e.g., psychological services and recreation) to conform to recommendations of professional associations.

SUBPART B—STATE ANNUAL PROGRAM PLANS AND LOCAL APPLICATIONS

Subpart B includes the requirements relating to State annual program plans, local educational agency applications, participation by the Bureau of Indian Affairs, and public participation.

Two new sections (sections 121a.150 and 121a.239) have been added to require assurances from the State educational agencies and local educational agencies that the program under Part B will be operated in compliance with the section 504 regulations, including the requirements under section 606 of the Education of the Handicapped Act regarding employment of qualified handicapped individuals in programs assisted under the Act. (The Office for Civil Rights has been delegated authority for enforcing section 606.)

A substantial number of commenters were concerned with the following major issues in this subpart: (1) the amount of data required of State and local educational agencies; (2) the excess costs, nonsupplanting and comparability requirements; and (3) the public participation requirements. In addition, as with other subparts, many commenters objected to statutory requirements and sought interpretations of the statute and regulations.

ANNUAL PROGRAM PLANS

CONDITION OF ASSISTANCE (§ 121a.110)

Section 434(b) of the General Education Provisions Act (GEPA), as amended by Pub. L. 93-380, requires each State to submit (1) a general application containing five assurances, and (2) an annual program plan for each Office of Education program under which funds are provided to local educational agencies through, or under the supervision of, the State educational agency. Under Section 434(b), and the implementing regulations (45 CFR 100b, Subpart B), the general application and an annual program plan take the place of a State plan for Part B (45 CFR 100b.19).

The five assurances required under section 434(b) of the GEPA cover proper administration, fiscal control and accounting, reports, supplanting, and submission of the annual program plan. Where Part B contains plan requirements covering the same subject matters, submission of those plan requirements is satisfied by the State's submission of the general application. They do not have to be submitted as part of the annual plan. The Part B plan provisions which do not have to be submitted in the annual program plan are referenced in 45 CFR § 100b.17(c)(2)(iv). Note that a substantive section on the nonsupplanting requirement for local educational agencies is set out in § 121a.230.

Under 45 CFR 100b.18(c), material may be incorporated by reference in an annual program plan if the material is in a document previously approved by the Commissioner and on file in the Office of Education. This should save some paperwork, particularly in the years after the first annual program plan (for school year 1977-1978) is submitted under these regulations.

The provisions to be included in the annual program plan for Part B are set forth in §§ 121a.120-121a.151 of these regulations (which include the conditions of eligibility and the State plan requirements under sections 612 and 613 of the Act and section 434(b)(1)(B)(ii) of the GEPA (which requires each annual program plan to "set forth a statement describing the purposes for which Federal funds will be expended during the fiscal year for which the annual program plan is submitted")).

APPROVAL; DISAPPROVAL (§ 121a.113)

The following is clarification about the submission of draft annual program plans for review by the Office of Education and how this would affect the issuance of grant award documents:

A State educational agency may elect to send a copy of its proposed annual program plan to the Commissioner for technical assistance purposes at the same time that the plan is being made available for public comment. However, funds cannot be obligated by a State before the date on which its official adopted plan is received in substantially approvable form by the Federal Government. (See 45 CFR 100b.35.)

EXAMPLE: A State educational agency's proposed plan for a particular school year is received by the Bureau of Education for the Handicapped on June 1. Its official plan is received on August 1. When BEH approves the plan (e.g. September 1), the State educational agency will receive a grant award document which will show August 1, as the earliest date of obligation under that plan.

EFFECTIVE PERIOD OF ANNUAL PROGRAM PLAN (§ 121a.114)

The Office of Education is proposing to use the period July 1-June 30 for State annual program plans in those programs where appropriations become available for obligation by the Federal Government each July 1 (the so-called "advance funded" programs). The purpose of this is to meet the statutory requirement for an annual program plan covering a 12-month period and at the same time to conform as closely as possible to the regular school year. However, even if the proposed procedure is adopted, the obligational period of State and local agencies for funds from any fiscal year would not be changed. If a State submits its annual program plan and receives its grant on the earliest possible date (July 1), the funds are available for obligation at the State and local level for 27 months, subject to submission or extension of the annual program plan for the following year. (This period includes the 12-month carryover provision under the Tydings Amendment. See 45 CFR 100b.55 (Obligation by recipients).) For example, if a State received its grant for fiscal year 1978 on July 1, 1977, the funds would be available for obligation at the State and local level from July 1, 1977 through September 30, 1979. The rules which govern when an annual program plan becomes effective, and State and local authority to obligate the Federal funds are located in 45 CFR Part 100b, Subpart B.

PUBLIC PARTICIPATION (§ 121a.120)

Comment: Commenters wanted this section to be expanded to require the States to describe in detail a number of additional specific steps to be taken in complying with the public participation requirements of the Act. For example, they wanted States to develop a roster of interested persons to whom plans and other documents would routinely be sent. The commenters felt that these steps would be necessary to insure full public participation.

Response: Requirements have been added (in §§ 121a.280 et seq.) to spell out in more detail the State's duties regarding public participation in development of the annual program plan (for example, indicating in the notice of public hearings of the plan the timetable for developing the final plan and submitting it to the Commissioner). A requirement has also been added to specify that the plan must be available for comment at least 30 days following the date notice is given.

Another revised section indicates that the public participation requirements for local educational agencies are to be comparable to those required of the State, except that public hearings are not required (§ 121a.234).

FULL EDUCATIONAL OPPORTUNITY GOAL REQUIREMENTS (§§ 121a.124-121a.126)

Comment: Commenters disagreed about the amount of data which should be required under this (and other) sections. Some commenters sought to have the regulations require a substantial amount of additional data (about the population of handicapped children and their placements) on the grounds that it is needed for effective monitoring. Others sought to have the amount of data to be reported substantially reduced as unnecessary and fulfilling no useful purpose.

Response: The final regulations eliminate the data requirements in proposed section 121a.24(a) for school year 1977-1978. Since the funds for FY 1978 became available for obligation by the Federal government on July 1, 1977, the States began submitting annual program plans for school year 1977-1978 before these regulations were published. Therefore, it would be inappropriate to impose a retroactive data requirement. No substantive change has been made in the data requirement for school years 1978-1979 and thereafter. The Office of Education believes that the remaining amount of data sought is necessary and adequate to provide information on what and how children are being served. Additional information may be sought on a case by case basis from each State where necessary to monitor compliance with Part B. In addition, requirements have been added to Subpart F to increase each State's monitoring and enforcement obligations.

Comment: Commenters requested that the data requirements regarding personnel needed to meet the full educational opportunity goal include various other professional groups, such as physical therapists, or use terms currently accepted by the professions, such as "therapeutic recreation specialists" rather than "recreation therapists."

Response: These changes have been made to cover the various personnel who provide special education or related services and to use terms currently recognized by the appropriate professional associations.

LOCAL EDUCATIONAL AGENCY APPLICATIONS

PARENT INVOLVEMENT (§ 121a.226)

Comment: Commenters wanted the regulations to require the establishment of a parent advisory committee in each school district.

Response: No change has been made. Extensive public and parental participation is already required under sections 121a.226 and 121a.234.

EXCESS COST REQUIREMENTS (§§ 121a.182–121a.186)

Comment: A substantial number of commenters requested clarification and explanation of the excess cost requirement.

Response: The section on excess costs has been broken out into five sections for easier reading. Section 121a.184 specifies that a local educational agency must spend a certain minimum amount for the education of handicapped children before Part B funds may be used. A detailed example of determining the minimum amount follows revised section 121a.184.

NONSUPPLANTING AND COMPARABLE SERVICES (§§ 121a.230–121a.231)

Comment: A substantial number of commenters requested clarification of these requirements. Some commenters proposed detailed procedures and urged that the regulations require the reporting of a substantial amount of data to monitor compliance with these requirements. Some commenters felt the comparability requirement should be met by comparing expenses for regular and special education.

Response: These sections have been substantially revised to attempt to explain these requirements. Detailed procedures and reporting requirements are not adopted at this time because local educational agencies are otherwise required to maintain auditable records to document their compliance with these and other requirements.

Regarding nonsupplanting, the regulation provides that the requirement applies to total aggregate funds and particular costs. A local educational agency meets the requirement if (1) the total amount or average per capita amount of State and local school funds budgeted by the local educational agency for expenditures in the current fiscal year for the education of handicapped children is at least equal to the total amount or average per capita amount of State and local school funds actually expended for their education in the most recent preceding fiscal year for which information is available. Allowances may be made for decreases in enrollment of handicapped children and unusually large amounts of funds expended for long-term purposes (construction); and (2) Part B funds are not used to displace State or local funds for any particular cost.

The statutory requirement for comparability is implemented by prohibiting a local educational agency from using funds under Part B to provide services to handicapped children, unless the agency uses State and local funds to provide services to those children which, taken as a whole, are at least comparable to services provided to other handicapped children in that local educational agency. This should insure that handicapped children who receive services with Part B funds are treated equally with handicapped children who do not receive services with Part B funds. It would be too difficult to make an objective comparison between special and regular education. The concern of the commenters who asked for this comparison should be met by the excess cost requirement, which provides that a local educational agency must spend a minimum amount, on the average, for each of its handicapped children.

Comment: Commenters requested that the regulations make it clear that the local applications must meet the requirements imposed on the State in Subpart B.

Response: A section has been added to make it clear that each local application must include additional procedures and other information which the State educational agency may require in order to meet the State annual program plan requirements in Subpart B. The requirement for local educational agencies to be consistent with the annual program plan is set forth in section 121a.236.

APPLICATION FROM SECRETARY OF INTERIOR (§§ 121a.260–121a.261)

These sections have been rewritten to clarify that the annual application by the Secretary of the Interior for schools operated for Indian children must meet the applicable requirements of section 614(a), include other material as agreed to by the Commissioner and the Secretary of the Interior, and meet monitoring and public participation requirements.

PUBLIC PARTICIPATION

See the comments on Section 121a.120.

SUBPART C—SERVICES

Subpart C contains regulations governing the major service components required under Part B of the Act. These include free appropriate public education, the full educational opportunity goal, priorities in the use of Part B funds, individualized education programs, direct services by the State educational agency, and the State comprehensive system of personnel development.

FREE APPROPRIATE PUBLIC EDUCATION

FREE APPROPRIATE PUBLIC EDUCATION REQUIREMENTS (§§ 121a.300–121a.303)

Comment: Commenters disagreed with the interpretation of "State law or practice" in the proposed regulations. Some commenters felt the exception to the requirement to make free appropriate public education (FAPE) available to children in the age ranges three through five and 18 through 21 applies only if State law (or a court order) specifically prohibits services, or only if the State's practice is to provide services to less than a majority of the State's handicapped children. Others felt the requirement does not apply to the lower and upper age ranges unless the State is in fact serving all nonhandicapped children in those age ranges.

Response: The requirement has been redrafted to clarify the use of the exception and to insure at a minimum that handicapped children in any of these age ranges are served to the extent nonhandicapped children are served (to be consistent with nondiscrimination requirements under section 504).

Section 121a.300 ("Timeliness for free appropriate public education") breaks "practice" down by individual public agency, disability category, and age group. This revision is designed to maximize the number of handicapped children aged 3–5 and 18–21 who receive services. It should reduce the reluctance of agencies wishing to serve children in those age groups, because services to a few handicapped children will not require services to all handicapped children in all of the disabilities.

Section 121a.300 also includes an amendment designed to insure that each time a public agency elects to serve a handicapped child, the child receives the full range of rights and services, whether or not FAPE is mandated for that age range.

FREE APPROPRIATE PUBLIC EDUCATION METHODS AND PAYMENTS (§ 121a.301–121a.303)

Comment: Commenters disagreed on which agencies or parties should bear the costs of educating a handicapped child, especially room and board costs. Commenters sought clarification of when the costs must be borne by the State or local educational agency.

Response: The proposed regulation on methods and costs for FAPE (proposed § 121a.201) has been redrafted and expanded as follows:

(1) A new paragraph has been added to section 121a.301, which states: "Nothing in this part relieves an insurer or similar third party from an otherwise valid obligation to provide or to pay for services provided to a handicapped child."

(2) Section 121a.302 states that if placement in a public or private residential program is necessary to provide FAPE to a handicapped child, the program (including non-medical care and room and board) must be at no cost to the child's parents.

Both of these changes have been made to conform to the regulations implementing section 504.

Other Changes: A new section 121a.303 has been added regarding the proper functioning of hearing aids. This section is based on a special study conducted by the Office of Education ("The Condition of Hearing Aids as Worn by Children in Public Schools," GPO publication date Summer, 1977).

FULL EDUCATIONAL OPPORTUNITY GOAL (§§ 121a.304–121a.306)

The statutory terms "free appropriate public education" and "full educational opportunity goal" are distinguished in this regulation as follows:

"Free appropriate public education" (FAPE) must (1) be made available to all handicapped children within the mandated time lines and age ranges set forth in the Act, and (2) include special education and related services which are provided in accordance with an individualized education program.

"Full educational opportunity goal" is broader in scope than "FAPE." It is an all-encompassing term, which (1) covers all handicapped children aged birth through twenty-one, (2) includes a basic planning dimension (including making projections of the estimated numbers of handicapped children), (3) permits each agency to establish its own timetable for meeting the goal, and (4) calls for the provision of additional facilities, personnel, and services to further enrich a handicapped child's educational opportunity beyond that mandated under the "FAPE" requirement. The term "goal" means an end to be sought. However, while an agency may never achieve its goal in the absolute sense, it must be committed to implementing this provision, and must be in compliance with the policies and procedures in the Annual Program Plan under this provision. Further, the agency is not relieved from its obligations under the "FAPE" requirement.

The proposed rule on full educational opportunity goal has been revised as follows: Proposed paragraph (a) (Program options) is now § 121a.305 and proposed paragraph (b) (Non-academic services) is now § 121a.306. A new § 121a.304 has been added which (1) requires each State educational agency to insure that each public agency establishes and implements a goal of providing full educational opportunity to all handicapped children, and (2) authorizes State and local educational agencies to use Part B funds to provide the facilities, personnel and services necessary to meet the goal.

A comment has been added following section 121a.304 which points to Congressional interest in having artistic and cultural activities included in programs supported under this part, subject to the priorities.

Comment: Many commenters asked that additional areas be added to the program options requirement (e.g., leisure education, cultural and performing arts, and occupational education). Other commenters requested that the term "consumer and homemaking education" be substituted for "home economics" in order to be consistent with the

vocational education amendments of 1976 (Pub. L. 94-482).

Response: No substantive change was made in this requirement. The program options included are examples and the list is not exhaustive. Under the regulation implementing section 504, any program provided to nonhandicapped students must also be made available to handicapped pupils. The language conforming to the vocational education amendments was added.

Comment: Commenters requested that under the requirement on nonacademic services the term "cocurricular" be substituted for "extra curricular" and that intramural, extramural, and interscholastic athletics be included in order to insure consistent use of terminology as it applies nationally. Another commenter suggested that specific language be included regarding participation of visually handicapped persons.

Response: The suggested terms were not adopted. This section conforms to the language in the final regulations under section 504. Also, the suggested language on visually handicapped was not included. This requirement applies to all handicapped individuals, including those with visual handicaps.

PHYSICAL EDUCATION (§ 121a.307)

Comment: Some commenters felt that the section on physical education (PE) needed to be clarified, particularly the conditions under which a handicapped child would not be required to participate in the regular PE program; (e.g., the child (a) is enrolled full-time in a separate facility, (b) needs specially designed PE, or (c) the parents and agency agree that the child should not participate). The main concern dealt with the parent-agency agreement, because it appeared to provide a loophole in which a child would not be required to participate in any PE activity.

Response: The statement on parent-agency agreement was deleted. With this change, a handicapped child attending a regular school would participate in the regular PE program, unless the child needs specially designed PE as prescribed in his or her individualized education program (IEP). Parent-agency agreement is inherent in the development of a child's IEP. The decision as to whether the child should be in the regular PE program or receive specially designed PE is made in the IEP meeting in which the parent and agency personnel are represented.

It should be noted that every handicapped child would participate in some type of PE activity. Specially designed PE could involve arrangements for a child to participate in some individual sport or physcial activity (e.g., weight lifting, bowling, or an exercise or motor activity program).

Other changes: Proposed section 121a.204 (Incidental use of property) has been deleted.

PRIORITIES IN THE USE OF PART B FUNDS

As part of the provision on free appropriate public education, the law requires each State and local educational agency to establish priorities, first with respect to handicapped children not receiving an education (defined as "first priority children" in the regulations) and second with respect to handicapped children, within each disability, with the most severe handicaps who are receiving an inadequate education (defined as "second priority children"). The law further requires that, except for State administration funds, each State and local educational agency must use its full entitlement under part B "in accordance with the priorities." The regulations which implement these priority requirements are included in sections 121a.320-121a.324.

PRIORITIES (§ 121a.321)

Comment: Many commenters were concerned that first priority expenditures cannot be used for inservice training for personnel who can serve those students, and stated that such inservice training activities may be an essential component toward achieving the first priority.

Response: The proposed rules have been redrafted and expanded in order to address the above concerns. A new section was added to make it clear that an agency may use Part B funds for inservice training concurrently with placing a first priority child in school (in an interim program, if a component of the child's program is missing). However, the provision of inservice training may not be used as a pre-condition for service to the child.

The intent of Congress with respect to the education of first priority children is both long-standing (dating back to Pub. L. 93-380) and very clear, as reflected in the following statements:

(1) The Congress has a responsibility "* * * to see that all persons are assured equal opportunity. For handicapped children, this means, at the very least, that they must be educated * * * These funds must be focused in such a way that we are assured that handicapped children are provided their right to education." (Congressional Record—Senate, June 18, 1975, p. S10969)

(2) "First priority for spending under the legislation is to provide services for handicapped children who are not now being served. The flexible approach in the Conference Report with respect to the current fiscal year, fiscal year 1977 and fiscal year 1978 will allow for concentrations of moneys so that this priority can be met." (Congressional Record—House of Representatives, November 18, 1975, p H12348)

(3) "There are millions of children with handicapping conditions who are receiving no services at all. And since we must have a place to start, it is appropriate that we give priority to those who are receiving no services at all first, and then try to reach those with the most severe handicaps who have traditionally received only minimal attention second." (Congressional Record—Senate, June 18, 1975, p S10961)

Comment: Several commenters requested clarification regarding whether the requirements on the use of funds for priorities apply within or among local educational agencies (e.g., if an agency is serving all of its first priority children, could a State give that agency's entitlement to another agency which is not serving all of its first priority children?).

Response: No change has been made. The statute does not permit the State to take away a local educational agency's Part B funds solely because the local educational agency is serving all of its first priority children. For the limited circumstances where a local educational agency's funds may be reallocated, see section 121a.708.

Other changes: A new paragraph (c) has been added to section 121a.321, which provides that Part B funds cannot be used for preservice training. This addition was made to implement Congressional intent expressed in Senate Report No. 94-168, p. 34 (1975), in which it was stated that funds for preservice training are available under the training program under Part D of the Act, and that Part B funds should not be used for this purpose.

INDIVIDUALIZED EDUCATION PROGRAM

The requirements on individualized education programs (IEPs) in Subpart C have been reorganized and redrafted substantially, based largely on comments received. (These sections have been renumbered, starting with section 121a.340.) A summary of these changes is included below:

(1) A definition of IEP has been added which states that the term "IEP" means a written statement on a handicapped child that is developed and implemented in accordance with sections 121a.341-121a.349 of Subpart C.

(2) The proposed section entitled, "Scope" has been deleted and the substance combined with the section on "State educational agency responsibility."

(3) The proposed section on "Local educational agency responsibility" has been replaced by two new sections ("When IEPs must be in effect" and "Meetings").

(4) The section on "Participants in meetings" has been redrafted to adopt essentially verbatim the language in the Act and to add a new paragraph on participation of evaluation personnel.

(5) The proposed section on "Parent participation" has been amended to include specific provisions regarding notifying parents about the IEP meetings.

(6) The substance under the proposed section on "Content of IEP" has been replaced with the statutory language.

(7) The proposed section on "Private school placements" has been reorganized into two sections to conform to the two groups of private school handicapped children in Subpart D, and has been expanded to spell out in more detail the responsibilities of State and local educational agencies in administering this provision.

(8) A new section was added, entitled, "IEP—accountability."

TIMING OF IEP MEETINGS (§§ 121a.342-121a.343)

Comment: Many commenters felt that the final rules should provide more flexibility to agencies in terms of when IEP meetings are conducted.

Response: The following changes were made in the proposed rules in an attempt to clarify this provision. First, the regulations now specify the dates on which IEP's must be in effect (October 1, 1977, and the beginning of each school year thereafter). Second, except for new handicapped children (those initially evaluated after October 1, 1977), the timing of meetings to develop, review and revise IEPs is left to the discretion of each agency. (For a new handicapped child, a meeting must be held within thirty days of a determination that he or she needs special education.) The regulations are flexible on the schedule to be followed by public agencies in meeting the above dates.

PARTICIPANTS IN IEP MEETINGS (§ 121a.344)

Comment: A number of commenters recommended that personnel from specific disciplines be participants at IEP meetings (e.g., physicians, health care personnel, psychologists, and representatives from other agencies, such as Head Start). Some commenters felt that the meetings should include all direct service personnel who work with a handicapped child. Other commenters suggested cutting back on the number of people who participate.

Response: The final regulations only require the participants listed in the statute, except in the case of a child who has been evaluated for the first time. (NOTE: Participation of evaluation personnel in IEP meetings is covered under the next comment-response sequence.)

Generally, having a large group of people at an IEP meeting may be unproductive and

very costly, and could essentially defeat the purpose of insuring active, open parent involvement.

While it is necessary to insure that all direct services personnel who work with a handicapped child are informed about and involved in implementing the child's IEP, this does not mean that they should attend the IEP meetings. The mechanism for insuring the involvement of all IEP implementers is left to the discretion of each agency (e.g., the child's teacher, or principal, or supervisor could have that responsibility). However, this is a basic administrative procedure which can be handled outside of the context of the IEP meeting.

The statute does not require all IEP implementers to be involved in the meetings. In fact, the definition of IEP in section 602(19) of the Act includes only four people (e.g., a special education provider or supervisor, the teacher, the parent, and the child, where appropriate). Moreover, it was the intent of Congress that IEP meetings generally be small. This position is reflected in the following statement by Senator Randolph in the June 18, 1975 Congressional Record:

In answer to my colleague, it was the intent, and I believe, I can speak for the subcommittee and the committee in this matter, that these meetings • • • be small meetings; that is, confined to those persons who have, naturally an intense interest in a particular child, i.e., the parent or parents, and in some cases the guardian of the child. Certainly the teacher involved or even more than one teacher would be included. In addition, there should be a representative of the local educational agency who is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of handicapped children.

These are the persons that we thought might well be included. That is why we have called them "individualized planning conferences". We believe that they are worthwhile, and we discussed this very much as we drafted the legislation.

While very large IEP meetings might generally be inappropriate, there may be specific instances where additional participants are essential. In order to enable other persons to be included, the Office of Education retained a provision from the proposed rules which authorized the attendance of "other participants, at the discretion of the agency or parents."

Comment: Some commenters recommended that members of the evaluation team participate in IEP meetings.

Response: A new paragraph has been added which states, in effect, that an evaluation person must participate in any IEP meetings conducted for handicapped children who have been evaluated for the first time (i.e., the preplacement evaluation required under section 121a.531 of Subpart E). Since the meeting is intended to develop an education program for the child, it is essential that someone at the meeting be familiar with the child's evaluation.

Comment: Several commenters recommended that the representative of the agency be qualified in the disability area in which the IEP is written.

Response: A comment has been added following section 121a.344 which suggests (but does not require) that either the teacher or the agency representative should be qualified in the area of suspected disability. At the time of the meeting, the public agency may not yet have hired a person qualified to provide special education with respect to that suspected disability.

PARENT PARTICIPATION (§ 121a.345)

Comment: Some commenters stated that documenting efforts to involve parents would be difficult and time consuming. One commenter felt it was important to retain the general statement requiring agencies to involve parents, but recommended that the details in the parent participation section be deleted from the final regulation. Another commenter recommended that the section be dropped because it is not required in the law and is "• • • utterly paternalistic. If a local education agency is foolish enough to keep inadequate records on transactions with parents, it alone stands in jeopardy; there is no damage to parents or to handicapped children."

Response: The comments have not been adopted. The Office of Education believes that it is important to retain this section in the final regulations, for the following reasons:

First, the section provides rules that allow agencies to proceed in conducting IEP meetings in cases where parents cannot or will not attend. Without this authorization, the IEP process might come to a halt in some cases, since the law states that an IEP must be developed at a meeting with the parents.

Second, the section is designed to protect agencies by setting the conditions under which they can proceed.

Third, the section is designed to protect the rights of the parents. The Congress intended that IEP meetings be utilized as an extension of the procedural protections guaranteed under Pub. L. 93-380. However, if the regulations provided an authorization for agencies to proceed without the parents, there is a potential problem that the authorization (without documentation) might be inappropriately applied in individual cases, which could result in parents' rights not being protected.

Comment: A few commenters suggested using surrogate parents if a child's parents could not attend an IEP meeting. One commenter recommended adding a provision to enable the parents to designate a person to represent them at a meeting.

Response: The Office of Education elected not to write regulations on either of these suggestions.

First, a surrogate parent is appointed only in accordance with the procedural safeguards in Subpart E. The provision was not meant to apply in situations when parents are unwilling to participate, or when an agency makes unsuccessful efforts to communicate with a known parent. A surrogate parent is appointed only when the parents are unknown, unavailable or the child is a ward of the state. However, a surrogate parent appointed under appropriate circumstances would attend the IEP meetings and represent the child in all matters relating to the provision of a free appropriate public education to the child.

Second, with respect to parent designated representatives, the Office of Education does not feel that any change in the regulation is warranted. Parents unable to attend an IEP meeting, who are interested enough in their child's education to seek a third party representative, would have direct input in developing the child's IEP through individual or conference telephone calls or other methods authorized under paragraph (c) of section 121a.345.

Other changes. A new paragraph (f) has been added to require that parents be given a copy of the IEP on request. This should help to insure that the parents are fully informed of the program for their child, and will assist them in participating in future meetings on the IEP.

CONTENT OF IEP (§ 121a.346)

Comment: Hundreds of commenters responded to this section. Some commenters requested that additional services or other items be added. Other commenters recommended that the section be sharply cut back, because they felt that this went unnecessarily beyond the items listed in the statute. Many of the commenters wanted the specific service areas they represent added to the list of services to be provided in the IEP. Others felt that this went unnecessarily beyond the items listed in the statute.

Response: The Office of Education has elected to amend this section by adopting substantially verbatim the language from section 602(19) of the statute. The regulation retains one clarification from the proposed rules, that the individualized education program must include related services to be provided to the child, as well as special education and the extent to which the child can participate in regular education programs. However, given the controversy over this section and whether it is appropriate to add items not specifically covered in the statute, the Office of Education has decided that some experience operating under the statute would be useful before considering whether further regulations on this point would be appropriate.

IEP—ACCOUNTABILITY (§ 121a.346)

Comment: In the preamble to the proposed rules, a statement was made that the IEP is not a legally binding document. Many commenters recommended that this statement should be included in the body of the final regulations. Other commenters felt that the statement needed to be clarified.

Response: The Office of Education has added a new section, which states, in effect, that each public agency must provide special education and related services in accordance with a handicapped child's IEP. However, Part B does not require that the agency, the teacher, or other persons be held accountable if the child does not achieve the growth projected in the written statement.

COLLECTIVE BARGAINING

Comment: Numerous commenters recommended that the regulations deal with the fact that the required participation of teachers (and other agency staff) in the meetings to develop IEPs would require modification of collective bargaining agreements. Some commenters urged that the regulations require additional compensation for teachers to participate in these meetings, prescribe or limit any after-school-hours participation, and specify arrangements for relieving teachers from classroom duties for the meetings.

Response: No change has been made in the regulation. The requirement for teacher participation in developing IEPs is statutory. The Commissioner understands that collective bargaining agreements and individual annual contracts for teachers vary greatly among local educational agencies and may or may not deal with additional duties and compensation for after-hour activities. In some instances, especially in urbanized and highly unionized areas, collective bargaining agreements may have to be renegotiated to cover employee participation in IEPs. However, this is an area which is solely within the authority of the public agency and its employees (and their union representative, if any). It would be inappropriate and beyond the scope of the Commissioner's authority to prescribe how this requirement must be met. Where collective bargaining agreements must be modified, the public agency must negotiate the appropriate modifications to comply with the statute. The public agency is also responsible for insuring that the IEP meetings are conducted at a time reasonably convenient to parents. (In some cases this may be during school hours; in others, after hours.) The agency also must make its own arrangements for covering classrooms when teachers are absent.

DIRECT SERVICES BY THE STATE EDUCATIONAL AGENCY

The direct services provision of this subpart includes sections on (1) use of local educational agency (LEA) funds, (2) nature and location of services, (3) use of the State's (SEA's) entitlement, and (4) a State matching requirement.

The section on the use of LEA allocations (renumbered section 121a.360) has been redrafted to combine the proposed paragraphs (a) and (b) into a single paragraph. This paragraph sets out the conditions under which an SEA may use an LEA's entitlement.

A new paragraph (b) has been added to section 121a.360, which states that in meeting the requirements of this section, the SEA may provide special education and related services directly, by contract, or through other arrangements.

A new paragraph (c) has been added, which repeats the statutory provision that the excess cost requirement does not apply to State educational agencies.

Section 121a.360 (Nature and location of services) has been amended to correct an error made in the proposed rule. The proposed regulation stated that the least restrictive environment (LRE) provisions do not apply when the SEA provides direct services. The amended rule now states that the manner in which the education and services are provided must be consistent with the requirements of this part (including the LRE provisions).

The regulation on "State matching" was not substantially changed. However, a comment was added after this section to make it clear that the requirement would be satisfied if the State can document that the amount of State funds expended on each major program area (e.g., the comprehensive system of personnel development) is at least equal to the expenditure of Federal funds in that program area.

Comment: In the preamble to the proposed rules under the direct services provision, a point was made that an LEA would not be in compliance with the section 504 regulations if that agency did not make available a free appropriate public education (FAPE) to all of its handicapped children. A commenter, in responding to this statement, pointed out that the term FAPE has different meanings under section 504 and Pub. L. 94-142; and, therefore, an LEA would not have to meet the requirements of Pub. L. 94-142 in order to be in compliance with section 504.

Response. Under Part B, "FAPE" is a statutory term which requires services to be provided in accordance with an IEP. However, under the section 504 regulations, each recipient must provide an education which includes services that are "designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met • • •" Those regulations state that implementation of an IEP, in accordance with Part B, is one means of meeting the "FAPE" requirement. (NOTE.—A more detailed description of the relationship between section 504 and Pub. L. 94-142 is included in this appendix.)

Other changes: A new section 121a.372 has been added to implement section 611(c)(3) of the Act. This section provides that the nonsupplanting requirement does not apply to the State's expenditure of its allocation beginning with funds appropriated for Fiscal Year 1979 and for each following fiscal year.

COMPREHENSIVE SYSTEM OF PERSONNEL DEVELOPMENT

GENERAL

The proposed rules in this section created some controversy over the amount of detail contained in the regulations. Comments ranged from requests for more specificity to suggestions that everything be deleted except the statutory language.

The statute is very clear in requiring that a "comprehensive system of personnel development" be implemented in each State. Since this is a broad requirement, challenging each State to reach out to the expansive community of agencies involved in preparing personnel to educate the handicapped, many of which are private and not under the control of the State, it was felt that a regulation was needed that would provide sufficient information for the State and involved agencies to understand their responsibilities in achieving compliance.

SCOPE OF SYSTEM (§ 121a.380)

Comment: A commenter suggested that inservice education be available to all special, regular, and related service personnel.

Response: Paragraph (a) of section 121a.380 was changed to read "the inservice training of general and special educational instructional, related services, and support personnel."

Comment: A commenter suggested that all personnel preparation services be conducted in accredited institutions granting advanced degrees and that "no less than ten percent of the money under this Act be contracted to institutions of higher education." Another commenter recommended the earmarking of a percentage of funds for staff and program development.

Response: No change has been made in the regulations. The Office of Education believes that each State must have maximum latitude in decisions regarding the types of facilities and personnel that are used to implement the comprehensive system of personnel development.

With respect to targeting funds for training, the Office of Education feels that such a step would be inappropriate at this time.

Part B is a unique Federal statute in that it imposes requirements on States which must be implemented, regardless of the amount of Federal funds available. Given the scope and magnitude of the law, the Office of Education believes that each State should have maximum latitude in terms of how its Part B funds are used to implement the various statutory provisions, subject, of course, to the priority requirements in Subpart C.

DEFINITION OF "APPROPRIATELY AND ADEQUATELY PREPARED AND TRAINED" (PROPOSED §121a.261)

A number of comments were received on the definition of "appropriately and adequately prepared and trained" which was in § 121a.261 of the proposed rules. The definition has been deleted in the final regulations. Instead, the term "qualified" is used, as defined in § 121a.12.

Comment: A commenter suggested that nationwide certification requirements be mandated to allow for the mobility of personnel.

Response: No change has been made. The intent of the Act is to insure that all personnel necessary to carry out the purposes of the Act are qualified. The Act does not authorize the establishment of national certification standards.

Comment: A commenter suggested that early childhood be required as an area for certification.

Response: No change has been made. These personnel must be included under the State's comprehensive personnel development system.

Comment: Several commenters expressed the belief that certification should not be required for all personnel directly serving the handicapped, or that such a requirement would result in great expense for the State. Still others felt that competency based systems should be used as opposed to the requirement for certification, registration, or licensing.

Response: The statutory language "appropriately and adequately prepared and trained" has been interpreted, by use of the term "qualified," to mean certification, registration, or licensing. These are commonly accepted procedures for determining if personnel are "appropriately and adequately prepared and trained."

PARTICIPATION OF OTHER AGENCIES AND INSTITUTIONS (§ 121a.381)

The comments on the level and intensity of the "participation" required in this section ranged from the belief expressed that special meetings on components of the state plan are not required in the Act, therefore the "participation" envisioned in section 121a.381 should be eliminated, to the suggested requirement that organizations not only have an opportunity to participate, but that they "must participate." The comprehensive system of personnel development is such a specialized aspect of the Act, necessarily involving agencies not under the jurisdiction of the State that "participation" is fully warranted, though not mandated in the statute. Thus, the regulations set a requirement for the State to insure that those agencies with an interest in the preparation of personnel for the education of the handicapped have an opportunity to participate fully in the development, review, and updating of the system. This is a reasonable requirement, especially considering the critical effect the system will have on those agencies preparing the personnel. Rather than a burden on the State, the "participation" should provide the direct opportunity for the State to encourage the development of quality personnel preparation programs, a factor essential to the provision of a "free appropriate public education."

Comment: Several commenters suggested that "representatives from each group be included in the planning" as well as parents. One commenter suggested that disability categories and groups be listed in the proposed rule.

Response: The regulation has been altered to include representatives of handicapped and parent organizations. This wording should be sufficient to involve all relevant groups.

Comment: A commenter suggested the addition of a subsection (3) to section 121a.381(b) that would require the annual program plan to include a description of agency responsibilities with respect to research and evaluation of exemplary programs that could be implemented in local educational settings.

Response: Sections 121a.385 and 121a.386 have been modified to classify agency responsibilities.

INSERVICE TRAINING (§ 121a.382)

Comment: There were a number of contrasting points of view and suggestions on this section, ranging from requests to mandate greater detail in the proposed rules, to the suggestion that the section be deleted altogether. Those proposing greater detail suggested that specific knowledge and areas of learning be emphasized and that teachers be trained "by having them work one-to-one with specialists" and that "inservice training be mandated at the local level, a county being the largest unit possible, to prevent the State from using the money for ineffectual regional workshops." Also, there were suggestions that where academic credit is to be made available that this be done

only in institutions of higher education with State approved programs.

On the other extreme there were suggestions that this section "exceeds statutory requirements" and "federal rules should not say how a task is accomplished" and "(state) provides adequate training and inservice and does not need more obstacles and regulations."

Response: The statute clearly requires inservice education as a central part of the comprehensive system of personnel development and it is appropriate for the rules to detail the nature and extent of the inservice education that is required. This has been accomplished through the outlining of procedures which define inservice education, its parameters, and relationship to required needs assessments. However, the rules do not define the specific nature of the training to be accomplished. Thus, the rules have been designed to outline the foundation for an adequate program of inservice education, without stifling the creativity of State and local personnel in their efforts to plan and implement such a system.

Comment: A commenter suggested that the statement "in cooperation with institutions of higher education" be inserted in section 121a.383(b)(1).

Response: No change has been made. However, involvement of institutions of higher education is required under § 121a.381(a).

Comment: A number of commenters suggested the addition of specific disciplines and professionals to this section, constituting an itemized list of personnel to be trained or involved in the review of training needs.

Response: No change has been made. The State's plan must include all personnel who need training.

Comment: Several commenters suggested wording changes designed to clarify the text of the proposed rule on inservice training.

Response: Changes were made where necessary to bring the regulation into conformity with current usage.

Comment: There were a number of suggestions concerning the financial arrangements for conducting inservice training. Some commenters advocated the funding of parent groups to conduct inservice training. Others suggested financial support for trainees involved in their programs. One commenter urged that the rule allow for contracting with other than non-profit organizations. One suggested contracts with institutions of higher education to carry out personnel development programs. Another suggested incentives for teacher participation, including released time and college credit. One suggested that inservice be provided during contract time, not involving extra hours.

Response: No substantive changes have been made. All of the suggestions in the above comments are authorized under these regulations.

PERSONNEL DEVELOPMENT PLAN (§ 121a.383)

Comment: Several commenters asked for special attention to physical education and service delivery models which take into account problems of rural families.

Response: No change has been made. Specialized needs in physical education and the unique aspects of providing services in rural settings should be addressed as appropriate in the needs assessment and plan.

Comment: One commenter objected to including preservice training under this section.

Response: No change has been made. The term "inservice" education is used in the Act. However, since the Act clearly requires that a "comprehensive system of personnel development" be developed, such a system must include the consideration of preservice training.

NOTE.—The data required in sections 121a.124 and 121a.126 of Subpart B on the numbers of handicapped children and the kind and number of personnel needed will serve as the uniform data base within the State for the personnel development system under § 121a.383 of this subpart. The data may also be used by institutions of higher education and other nonprofit educational training agencies in submitting personnel preparation applications under Part D of the Act. Section 121f.9 of the regulations under Part D (45 CFR 121f.9) provides as follows:

§ 121f.9 *State personnel needs.*

Each application shall include (a) a statement by the State educational agency of personnel needs for education of the handicapped and a statement by the applicant of how the proposed program relates to those stated needs, and (b) a description of the ways in which the recipient's program goals and objectives relate to the purposes of Part D of the Act.

(20 U.S.C. 1431, 1432, 1434)

DISSEMINATION (§121a.384)

Comment: One commenter suggested that "teachers organizations" be specified as recipients of information.

Responses: No change has been made. Teacher organizations are included under the phrase "other interested agencies and organizations."

SUBPART D—PRIVATE SCHOOLS

The proposed rules created a certain amount of confusion among commenters in distinguishing between handicapped children placed in or referred to private schools by the State or by local educational agencies and handicapped children whose parents choose to educate them in private schools. The major difference between these two groups of children is in who bears the cost of the private school.

A free appropriate public education must be made available to each handicapped child by the public agencies of the State. Subject to the requirements on least restrictive environment, this could include placement in or referral to a private school or facility. Such a placement or referral must be at no cost to the parent.

On the other hand, even if a free appropriate public education is available, the parent may choose not to accept it. The parent may choose to send the child to a private school rather than take advantage of the free public education. If this happens, the Act does not require the State or local educational agency to bear the cost of the private school. For children placed in private schools by their parents, the State and its local educational agencies have a different duty. They must design their program so that handicapped children in those private schools can participate in special education and related services offered by the local educational agencies if the parents of those children so desire.

The regulations have been reorganized to make these distinctions clearer. The first set of sections (121a.400–121a.403) now cover children placed in or referred to private schools or facilities by a public agency in order to provide them with special education or related services. (These sections replace sections 121a.320–121a.323 of the proposed rules.)

Since the "State" includes all of its political subdivisions, the term "public agency" is used, as elsewhere in the regulations, to mean all of the political subdivisions of the State which are responsible for providing special education or related services to handicapped children.

The second set of sections (121a.450–121a.460) apply to handicapped children enrolled in private schools or facilities but who are not placed or referred there by a public agency to receive special education or related services. (These sections replace sections 121a.300–121a.306 of the proposed rules.)

The following comments were made regarding proposed Subpart D. Comments which asked for changes not authorized under the statute are not summarized. (Commenters who are concerned about the cost of room and board as a "related service" are referred to section 121a.302 and the discussion of that section in this preamble.) The comments are arranged in order of the final rules.

RESPONSIBILITY OF STATE EDUCATIONAL AGENCY (§ 121a.401)

Comment: A commenter asked that paragraph (a)(3) be deleted, which required that the special education given to a handicapped child placed by a public agency must meet the education standards of the State educational agency (SEA). The commenter stated that otherwise there would be conflicts between the SEA's standards and those of other agencies, in the day care area, for example.

Response. Paragraph (a)(3) cannot be deleted, since it is derived from a statutory requirement. However, it has been revised by using the language of the statute. This will broaden the types of standards that the SEA may apply, and therefore avoid conflict with other mandatory standards. Of course, those standards cannot override the provisions in Part B of the Act.

Comment: A commenter asked that provision be made for interstate referrals to private schools and communication among States regarding those referrals.

Response. No change has been made in the regulation. Referrals between States are to be handled under existing procedures. Unless a problem develops in this area that seriously interferes with the rights of handicapped children or their parents under Part B, the Office of Education is reluctant to regulate the mechanisms by which the States arrange to provide services.

IMPLEMENTATION BY SEA (§121a.402)

Comment: A commenter suggested that the State educational agency insure the monitoring of private schools, dissemination of standards to them, and involving them in developing State standards, rather than the State educational agency doing it directly.

Response: No change has been made. The statute places direct responsibility on the State educational agency to administer and monitor the requirements under Part B. While the State educational agency in many areas need only insure that the Part B requirements are met, monitoring must be done by the agency itself. Dissemination of standards could be done in a variety of ways. Involvement in development of State standards would have to be done directly by the State educational agency if it is the agency that develops those standards.

PLACEMENT OF CHILDREN BY PARENTS (§ 121a.403)

Comment: Commenters were concerned with the effect of this section on the rights of handicapped children in private schools and felt that the section was worded in a manner that would limit those rights.

Response: The section has been revised to make it clear that a free appropriate public education (FAPE) must be made available to

each handicapped child. This would include the development of an individualized education program and placement in the least restrictive environment. Free appropriate public education must be made available at no cost to the parents. If the parents felt that services were not adequate, they may have a due process hearing to show that more or better services must be provided to give their child FAPE. However, if the parents choose not to educate their child in the public school system, they are not required to do so. In that case, the relevant public agency has the remaining duty of offering special education and related services under sections 121a.450–121a.460, but does not have the duty of insuring that the private school meets the requirements of Part B (unless other handicapped children have been placed in or referred to that private school by the agency), or of paying for the cost of the private school. Language has been added to clarify the public agency's duties under sections 121a.450–121a.460.

Other changes: Proposed section 121a.323 (Placements in another State) has been deleted. It would have required private schools to meet the standards of both the sending and receiving States. This would have been an unreasonable burden on the receiving State to enforce.

HANDICAPPED CHILDREN IN PRIVATE SCHOOLS NOT PLACED OR REFERRED BY PUBLIC AGENCIES (§§ 121a.450–121a.460)

Comments: A number of commenters felt that clarification was needed in these sections. There was also some concern expressed regarding the State's legal authority to provide services to children enrolled in private schools.

Response: The regulations have been amended to conform more closely to those under Title I of the Elementary and Secondary Education Act of 1965 (education of educationally deprived children) (45 CFR, Section 116a.23). As under Title I, a balance is drawn between the statutory requirement to provide services, and the constitutional necessity of avoiding excessive entanglements between public agencies and church-related institutions. It is also important for the Office of Education to have a uniform policy regarding services to private school children under all Federal education programs it administers. The amendments to the proposed rules should serve all of these purposes.

SUBPART E—PROCEDURAL SAFEGUARDS

This subpart implements the procedural safeguards set forth in the Act, including due process procedures for parents and children, protection in evaluation procedures, least restrictive environment, confidentiality of information, and procedures of the Office of Education.

A substantial number of detailed comments were received on these sections. Many concerned the statute rather than the regulations or did not state what changes in the regulations were desired. Others requested revisions which did not appear to involve substantive changes. Some comments sought substantially more detailed specification of due process rights while others indicated that the statute itself was so detailed in the due process area that the regulations should not go beyond the statute.

As stated earlier in this preamble, the Office of Education's position, while incorporating a number of the suggestions in the final regulations, is still to adopt minimum regulations in this area at this time, review experience under the regulations, and then made a determination as to whether more detailed regulations are required.

DUE PROCESS PROCEDURES FOR PARENTS AND CHILDREN

DEFINITIONS (§ 121a.500)

Comment: Commenters recommended that the phrase "unless it is clearly not feasible to do so" be deleted from the definition of consent and that additions be made to make it clear that consent may be revoked and may not be made a precondition to the child's right to participate in basic educational programs. The effect of deleting the phrase would be to require that a consent is not valid unless the parent is informed in every case of the information relevant to the consent.

Response: The phrase has been deleted. The deletion of the phrase will help to assure an informed consent in every case, regardless of the parent's language or other mode of communication. A phrase has been added to make it clear that parents have the right to revoke consent. A separate section 121a.504 states that consent may not improperly be made a precondition of services. While public agencies must obtain consent for preplacement evaluations or for initial placement, a public agency may not coerce parents to consent by withholding or threatening to withhold other regular education services or extracurricular activities unless the parent consents.

Comment: Several commenters requested changes in the definition of "evaluation" to indicate that an evaluation must be conducted by qualified personnel, that the findings must be reduced to writing, and that it must take into account the child's assets as well as deficits.

Response: No change has been made. The suggestion reagarding qualified personnel is covered under section 121a.532. The Office of Education expects that evaluations will be in writing and that a child's assets will be considered. If a problem develops in this area, the Office of Education will reconsider the necessity for further regulations.

GENERAL RESPONSIBILITY OF PUBLIC AGENCIES (§ 121a.501)

Comment: Commenters suggested that parents have the right to complain and that agencies should be required to respond to them outside of the context of a hearing.

Response: No change has been made in the regulation. However, agencies should certainly seek to respond to complaints by informal discussions and negotiations. A comment section has been added which notes that mediation may be useful in some instances. In any case, negotiations may not delay a hearing if a parent has requested it.

INDEPENDENT EDUCATIONAL EVALUATION (§ 121a.503)

Comment: Commenters disagreed as to whether the parent's right to an independent evaluation should be broadened or narrowed.

Response: The section has been rewritten to require public agencies to provide parents information, upon request, of where an independent educational evaluation may be obtained. Also, "public expense" has been defined. However, the interpretation in the proposed regulations is retained. The evaluation must be at public expense if the parent disagrees with the evaluation by the public agency, unless the public agency initiates a hearing to show that its evaluation is appropriate. If upheld, the expense of the independent evaluation does not have to be borne by the agency. The independent evaluation must be considered in any hearing.

There are several competing interests which the regulation seeks to balance. The statutory right of the parent to an independent educational evaluation must be preserved. On the other hand, the public agencies should not be asked to bear the costs of unreasonably expensive independent evaluations. Also, for the independent evaluation to be useful, it must meet the same criteria as evaluations conducted by public agencies under this part.

PRIOR NOTICE; PARENT CONSENT AND CONTENT OF NOTICE (§§ 121a.504–121a.505)

Comment: Commenters sought further specificity as to the detail of information provided to parents in the notice. Other commenters felt that the requirements were too demanding. Some commenters asked that consent be required for preplacement evaluation and prior notice for reevaluation; and that consent be extended to include permission for placement. Other commenters sought to delete the consent requirement on the grounds that educational judgments should be final.

Response: The basic notice requirements in sections 121a.504 and 121a.505 were not changed. However, the following changes were made in the consent requirements:

(1) Consent was expanded to include permission for initial placement of a handicapped child in a special education program. Many commenters had requested this addition; and the Office of Education agrees that this requirement is as essential as consent for preplacement evaluation.

(2) The proposed consent rule was changed from consent for all evaluations to consent for the initial or preplacement evaluation. This change is essentially consistent with the section 504 final regulations (45 CFR Part 84, § 84.35(a)). The Office of Education agrees with commenters that there is no need to require consent for reevaluation. If a handicapped child is initially placed in accordance with section 121a.504, and if his or her individualized education program is annually reviewed in accordance with section 121a.343 of Subpart C, a requirement is not necessary. However, prior notice would have to be provided.

Comment: Commenters were especially concerned that clarification be added regarding procedures for overriding parents' refusal to consent.

Response: A subsection has been added to set out procedures for dealing with parental refusal to consent (see section 121a.504(c) and the comment following that section).

The procedures are designed not to interfere with existing State laws which may require consent. Where State law does not require consent, the parent is afforded a due process hearing under this Part. These rules should provide protection to the parent, the child, and the public agency.

IMPARTIAL DUE PROCESS HEARING (§ 121a.506)

Comment: A commenter asked that the regulations specify that the public agency must pay for the hearing.

Response: The change requested by the commenter has not been made. Since the statute requires that the public agency must afford parents an opportunity for a hearing, the agency must bear the cost of the hearing, except for paying for parents' representatives and witnesses. However, section 121a.506 has been amended to require agencies to provide parents with information about free or low-cost legal and other relevant services that are available.

IMPARTIAL HEARING OFFICER (§ 121a.507)

Comment: Commenters sought to have three-person panels, including parents, serve as the hearing officials. Some sought to allow and others sought not to allow school board officials from serving as hearing officials. Com-

menters also asked that lists of hearing officers be required, including their qualifications.

Response: A requirement has been added that each public agency keep a list of persons who serve as hearing officers and a statement of their qualifications. This should help to ensure that the requirement for impartiality is met. No other substantive change has been made. A three-person panel could be used under the existing rules, as long as the conditions of impartiality are met. However, a parent of the child in question and school board officials are disqualified under section 121a.508.

HEARING RIGHTS (§ 121a.508)

Comment: Commenters disagreed as to whether hearing rights set forth in the proposed rules should be expanded or restricted. Among the additional rights sought were the right to compel the attendance of witnesses, prohibit the introduction of evidence not disclosed prior to the hearing, allow the child to be present and the hearing to be open to the public at the parents' discretion, and to specify whether the record of the hearing must be free or at reasonable cost.

Response: The section has been revised to add rights for any party to prohibit the introduction of evidence not previously disclosed to the other party and for the child to be present and the hearing to be open to the public. The purpose of hearings under this part is to ensure that handicapped children are provided free appropriate public education. Opening up the hearing and the evidence that may be presented should serve to insure that the result of a hearing will be in the best interests of the child. No provision has been added relating to cost. However, it is expected that a copy of any decision would be provided to the parent at no cost.

HEARING DECISION; APPEAL (§ 121a.509)

Comment: A commenter sought to add a requirement that specifies that the hearing officer has the power to order any educational program for the child and that his or her power not be limited to accepting or rejecting the program by the public agency or parent.

Response: No change is necessary. The hearing officer has the function to decide what placement is appropriate, if that is the subject of the hearing.

ADMINISTRATIVE APPEAL; IMPARTIAL REVIEW (§ 121a.510)

Comment: Commenters disagreed on whether to reduce or expand the requirements in this section. Some commenters wanted short, specific timelines set out for various actions and specification of the rights that apply at the review level.

Response: The section has been revised to specify other duties and powers of the reviewing official, in addition to those already set out. For example, the official may seek additional evidence if necessary, including holding a new hearing and affording the parties an opportunity for written as well as oral argument (at the reviewing official's discretion). The reviewing official must give a copy of the written findings and decision to the parents. These duties and powers are regarded as necessary to insure that a full review will be conducted and that all parties will be informed of the result of the review. Revisions to timelines for any hearing or review are set out in section 121a.512.

CIVIL ACTION (§ 121a.511)

Comment: Commenters wanted the regulations revised to allow for direct appeal to the courts without first using administrative hearing and review procedures if those procedures would be futile, the timeliness or adequacy of the administrative proceedings are being challenged, or a class action is involved. Commenters cited language in the Congressional Record in support of this interpretation (121 Cong. Rec. S20433 daily ed., November 19, 1975).

Response: No change has been made. The legislative history cited is nongermane as it was made in reference to the Senate Bill (S. 6) which did not contain the final statutory provision on civil actions. The provision on civil action was added as a Conference substitute. The issue of exhaustion of remedies will be up to the courts to resolve.

TIMELINESS AND CONVENIENCE OF HEARINGS AND REVIEWS (§ 121a.512)

Comment: Commenters wanted clarification of the 45-day time limit for commencing and completing a hearing and review set out in the proposed regulations. They disagreed on whether the time should be shortened or lengthened.

Response: The section has been revised to set a 45 day time limit for a hearing and a 30 day limit for a State level review. In both instances, a decision must be reached and mailed to each of the parties within the time limits set. A hearing or reviewing officer may grant specific extensions, at his or her discretion, at the request of either party. The Office of Education believes reasonable outside time limits must be set to insure resolution of any dispute quickly so that the child's special education may proceed. Discretion for specific extensions is consistent with normal judicial and administrative practice.

CHILD'S STATUS DURING PROCEEDINGS (§ 121a.513)

Comment: Commenters suggested a provision be added to allow change of placement for health or safety reasons. One commenter requested that the regulations indicate that suspension not be considered a change in placement. Another commenter wanted more specificity to make it clear that where an initial placement is involved, the child be placed in the regular education program or, if the parents agree, in an interim special placement.

Response: A comment has been added to make it clear that this section would not preclude a public agency from using its regular procedures for dealing with emergencies.

SURROGATE PARENTS (§ 121a.514)

Comment: Commenters requested that the regulations clarify when surrogates may be appointed. One reason given was to insure that agencies do not attempt to appoint surrogates when parents are uncooperative or nonresponsive.

Response: The section has been revised to make it clear that the requirements for appointing surrogates apply only when no parent can be identified, the agency after reasonable efforts cannot discover the whereabouts of a parent, or the child is a ward of the State. Agencies are not allowed to appoint surrogates when parents are uncooperative or nonresponsive.

Comment: Commenters requested that the regulations further specify procedures to be used for the appointment of surrogates, including administrative proceedings with notice to interested parties and the right of interested parties to seek a review of the decision.

Response: No change has been made. State procedures for the appointment of surrogates will be followed. Disagreements about the choice of surrogates may be the subject of a due process hearing under section 121a.506.

Comment: A number of commenters suggested that the regulations provide more detail about the qualifications of the surrogates (for example, requiring training and a commitment to becoming acquainted with the child).

Response: No change has been made. The Office of Education believes these concerns are covered by section 121a.514(c)(2) which requires that the surrogate have knowledge and skills that insure adequate representation of the child.

Comment: A number of commenters were concerned about the legal liability of surrogates. Some commenters wanted the regulations to protect surrogates from any legal liability.

Response: No change has been made. The legal liability of surrogates will be determined under State law relating to such matters as breach of fiduciary duty, negligence, and conflict of interest. The Federal government has no authority to limit legal liability.

Comment: A number of commenters sought clarification regarding which agency employees could serve as surrogates. For example, one commenter wanted the regulations to indicate whether the head of a State institution could serve as the surrogate.

Response: The regulation has been reworded to make it clear that no employee of any agency involved in the education or care of the child may serve as the surrogate parent.

PROTECTION IN EVALUATION PROCEDURES

Section 612(5)(C) of the Act requires States to establish non-discriminatory testing procedures for use in the evaluation and placement of handicapped children. The requirements for public agencies to follow in carrying out this provision are set forth in sections 121a.530–121a.534 of Subpart E. (These section numbers have been changed to correspond with other number changes in Subpart E.)

The evaluation procedures in the proposed rules have been changed to conform to the corresponding requirements in the final regulations for section 504 of the Rehabilitation Act of 1973 (45 CFR Part 84, § 84.35) and in response to other comments received. (Many of the comments dealing with the language and substance of the proposed evaluation procedures are covered by the above conforming changes.) A summary of the changes in these procedures is included below:

(1) Proposed section 121a.431 ("Evaluation; change in placement") has been replaced with new section 121a.531 ("Preplacement evaluation"). This corresponds to section 84.35(a) of Part 84.

(2) Proposed section 121a.432 ("Evaluation procedures") has been divided into two sections (section 121a.532 "Evaluation procedures" and section 121a.533, "Placement procedures"). The new section on evaluation procedures (a) incorporates essentially verbatim the language of section 84.35(b) of Part 84, (b) adds two additional requirements from section 612(5)(C) of the Act which are not in Part 84 (e.g., the provision on native language, and the requirement that "No single procedure is used as the sole criterion for determining an appropriate educational program for a child"), and (c) requires that the evaluation be made by a "multidisciplinary team * * * including at least one teacher or other specialist with knowledge in the area of identified disability * * *"

(3) The new section on placement procedures incorporates essentially verbatim the language in section 84.35(c) of Part 84. In addition, the section ties the development

of an individualized education program to the placement procedures.

The following additional comments were made regarding evaluation procedures:

Comment: Several commenters felt that the regulations should require State and local educational agencies to develop procedures for the conduct of evaluations. This would make it possible to determine the adequacy of the evaluations and to insure uniformity in basic procedures.

Response: A paragraph was added to section 121a.530 (General) which requires the State educational agency to insure that each public agency establishes and implements evaluation—placement procedures.

Comment: Several commenters felt that timelines should be set for implementing the evaluation process (e.g., for initial referral to evaluation and placement).

Response: No change has been made. The Office of Education has elected to impose very few absolute timelines in the regulations for this part, because of the potential administrative and legal problems they can cause. Imposing timelines can actually delay the provision of a service (for example, if the time periods are regarded as both minimum and maximum times for implementing a procedure).

A child should be evaluated as soon as possible following referral. Any undue delay in providing the evaluation would raise the question of the State and local educational agencies' compliance with sections 121a.128 and 121a.220 (identification and evaluation of all handicapped children).

Comment: Some commenters requested clarification regarding whether a reevaluation is needed, as required by proposed section 121a.431(a)(2), if the parents and agency agree that the child should be transferred from a special education program to a full time regular class placement.

Response: This specific section has been deleted in the final regulations. However, any changes in a child's placement (including a transfer to a regular class) would not be made until after a meeting is held to review the child's individualized education program in accordance with the requirements under sections 121a.340–121a.349 of Subpart C. If the parents and agency agree that the child no longer needs special education, a reevaluation would not be necessary. Section 121a.531 requires an evaluation before initial placement only. Reevaluations are covered under section 121a.534.

LEAST RESTRICTIVE ENVIRONMENT

Section 612(5)(B) of the Act requires States to establish policies and procedures to insure that "to the maximum extent appropriate, handicapped children * * * are educated with nonhandicapped children * * *." The regulations for implementing this provision are set out in sections 121a.550–121a.556 of Subpart E.

A new paragraph was added to section 121a.550 which requires the State to insure that all public agencies establish and implement procedures in accordance with the requirements of this subpart. In addition, a new section, entitled "Nonacademic settings" was added. This section is taken from a new requirement in the section 504 regulations (45 CFR Part 84, § 84.34).

GENERAL (§ 121a.550)

Comment: A number of commenters requested that provisions be made for special support in the regular classroom in order to accommodate handicapped children (e.g., including reducing the pupil-teacher ratio and assigning aides to the room).

Response: No change was made, since the statute already authorizes the use of supplementary aids and services as a means of enabling a handicapped child to be educated with nonhandicapped children.

CONTINUUM OF ALTERNATIVE PLACEMENTS (§ 121a.551)

Comment: Many commenters responded to this requirement. Some felt that terms other than "continuum" should be used (e.g., "range of programs" and "variety of services"). A large number of commenters felt that "continuum" carried negative connotations (e.g., statements were made that the concept undermines the ideals of Pub. L. 94–142, that it implies best-to-worst, etc.). Other commenters felt that it discriminated against residential or private schools, and suggested that efforts be made to counteract this bias.

Response: No change has been made in this section. The term "continuum," as with "least restrictive environment" (LRE), is commonly used by agencies, advocates, and parents. However, there is nothing to prohibit an agency from using terms such as those included above in administering these provisions.

As with "LRE," the term that is used is not as important as the basic provision and how that provision is implemented. The purpose of a continuum is to be able to accommodate to differences between handicapped children in terms of the degree of special assistance they need to receive a free appropriate public education. This matter was dealt with directly in the June 26, 1975 Report of the House of Representatives on HR 7217 (H. Rept. No. 94–332, p. 9):

The Committee understands the importance of providing educational services to each handicapped child according to his or her individual needs. These needs may entail instruction to be given in varying environments, i.e., hospital, home, school or institution. The Committee urges that where possible and where most beneficial to the child, special educational services be provided in a classroom situation. An optimal situation, of course, would be one in which the child is placed in a regular classroom. The Committee recognizes that this is not always the most beneficial place of instruction. No child should be denied an educational opportunity; therefore, H.R. 7217 expands special educational services to be provided in hospitals, in the home, and in institutions.

When it is clear that, because of the nature or severity of a child's handicap, the child must be educated in a setting other than the regular class, it is appropriate to implement such a placement. However, the LRE provision is also designed as a rights provision to protect against indiscriminate placement of a child in a separate facility solely because the child is handicapped and not because special education is needed in that type of setting.

Even with respect to severely handicapped children, it may be possible to meet the "regular education setting" goal by having a separate class or separate wing in a regular school building.

PLACEMENTS (§ 121a.552)

Comment: Many commenters were concerned that there may be an overzealous implementation of the LRE provision without regard to the needs of individual handicapped or nonhandicapped children.

Response: No substantive change has been made in this section, because the Office of Education feels that the section includes necessary safeguards to insure protection against the above concerns. With respect to those concerns, the overriding rule is that each child's placement must be determined annually and be based on his or her individualized education program.

With respect to concerns about the harmful effect of placing handicapped children in regular classes, the analysis of the section 504 regulations indicates: "* * * it should be stressed that, where a handicapped child is so disruptive in a regular classroom that the education of other students is significantly impaired, the needs of the handicapped child cannot be met in that environment. Therefore regular placement would not be appropriate to his or her needs * * *" (45 CFR Part 84—Appendix, paragraph 24)

Comment: A commenter requested that a new provision be added which requires State and local educational agencies to utilize community-based early childhood development programs for 3–5 year old handicapped children. The main intent of the new provision is "aimed solely at assuring maximum appropriate mainstreaming."

Response: No change was made in the section. The existing provisions are considered to be adequate to cover the intent of this request.

CONFIDENTIALITY OF INFORMATION

NOTICE TO PARENTS (§ 121a.561)

Comment: Commenters asked that the detailed content of the notice requirements be deleted as excessive.

Response: No change has been made. The Office of Education believes the provisions require that States provide necessary information to inform parents about the type of information collected about handicapped children to meet the requirements of this part.

ACCESS RIGHTS (§ 121a.562)

Comment: Commenters requested that this section be expanded to require that access to records be given in no case less than five days prior to meetings to develop individualized education programs or any hearing and to permit authorized representatives of the parent to inspect the record. A commenter felt the 45-day outside time limitation could be misinterpreted to mean an agency need not comply at all after 45 days from the date of the request.

Response: Language has been added to make it clear that an agency must comply with a request for access before any meeting regarding an individualized education program. This will help insure that interested parents are able to familiarize themselves with their child's records prior to any meeting and be able to participate more knowledgeably. The prohibition against unnecessary delay places an obligation on the agency to make the records available in a timely manner so that the Office of Education does not believe it is necessary to specify a specific time limitation. Section 121a.562 has been amended to give parents the right to have an authorized representative inspect their child's education records.

The 45-day time limitation is not subject to the misinterpretation the commenter fears. This language is from the Family Educational Rights and Privacy Act, section 438 of the General Education Provisions Act (specifically section 432(a)(1)(A)), to which these regulations are tied (by statute).

FEES (§ 121a.566)

Comment: A commenter felt the first copy of a record should be given free upon request from the parents.

Response: No change has been made. The prohibition against charging a fee if it would effectively prevent the parents from inspecting and reviewing the record is based on a requirement in the Family Educational Rights and Privacy Act, to which these regulations are limited by statute (section 612

(2)(C)). Agencies may of course adopt policies of making copies available free of charge and are encouraged to do so.

HEARING PROCEDURES (§ 121a.570)

Comment: A commenter requested clarification of who conducts a hearing.

Response: The section states that the procedures under § 99.22 (the hearing procedures in the regulations for the Family Educational Rights and Privacy Act) be used. Section 99.22(b) states the hearing may be conducted by any party, including an official of the educational agency or institution, who does not have a direct interest in the outcome of the hearing.

CONSENT (§ 121a.571)

Comment: Commenters requested that "advanced students," "persons acting as practicum advisors," and researchers be given access to records without consent.

Response: No change has been made. The Family Educational Rights and Privacy Act specifically lists parties and conditions where records may be released without parental consent.

SAFEGUARDS (§ 121a.572)

Comment: A commenter requested a list of positions rather than a list of names of employees who may have access to personally identifiable information.

Response: The requirement has been modified to require a list of names and positions to more fully inform parents and the public of the categories of individuals given access to data as well as the specific individuals who may have access.

DESTRUCTION OF INFORMATION (§ 121a.573)

Comment: A number of commenters were concerned about the destruction requirements. The principle concern was that detailed records might be needed by the handicapped individuals to show proof of need for further services from other agencies. One recommendation was that the parent and child be notified of the existence of the records at the time of graduation and informed that they would be destroyed only upon request of the parent or child. Another commenter suggested that records be maintained, but that parents be given the option to have them destroyed.

Response: The requirement has been revised to permit the parents to request that the information be destroyed and to require the public agency to inform the parents of the destruction option and their right to have the records destroyed upon request. The notice would normally be given at the time a child graduates or otherwise leaves the agency. The purpose of the destruction option is to insure that nonessential records about a child's behavior, performance, and abilities, which may possibly by stigmatizing and are highly personal, are not kept after they are no longer needed for educational purposes. Destruction of these records is the best protection against improper or unauthorized disclosures. However, the handicapped child or his or her parents may need certain records for other purposes (such as proof of eligibility for benefits).

Comment: Commenters asked that notice be given to a child who has reached the age of majority.

Response: No change has been made. Section 121a.574 requires the State educational agency to have policies and procedures regarding children's privacy rights. Where education records are maintained by an agency covered under the Family Educational Rights and Privacy Act, these rights must include transfer of the rights of parents to the child when he or she reaches 18 or the postsecondary education level.

Other Changes: The regulations have been revised to make it clear that the records covered under this Act are the same as the type of records covered under the Family Educational Rights and Privacy Act. Consistency in coverage is necessary to avoid undue administrative burdens on public agencies covered by both laws.

OFFICE OF EDUCATION PROCEDURES

General: The requirements in these sections largely repeated the statute. Perhaps for this reason, few comments were received on the Office of Education procedures.

WAIVER OF REQUIREMENT REGARDING SUPPLEMENTING AND SUPPLANTING WITH PART B FUNDS (§ 121a.589)

Comment: A commenter requested that the special study to determine if a waiver of the requirement should be granted include a review of whether grievance procedures are operational. Other commenters disagreed on the need for this study.

Response: A requirement has been added to have the study cover the adequacy of the State's due process procedures, as this is an important part of insuring that grievances are heard and to determine if parents and other parties are satisfied with the adequacy of the State's programs for handicapped children.

WITHHOLDING PAYMENTS (§ 121a.590)

Comment: Commenters asked for definitions of "substantial compliance" and "failure to comply." Commenters also urged that the Office of Education, the Office for Civil Rights, and Departmental audit officials apply the same criteria.

Response: No change has been made. The Office of Education believes these terms will have to be defined on a case-by-case basis.

The Office of Education and the Office for Civil Rights will coordinate and cooperate in enforcing requirements under this Part and Part 84 (the regulations for section 504 of the Rehabilitation Act of 1973) where identical requirements are involved. The Office of Education will make every effort to insure that auditing officials understand and apply any criteria used by program officials.

SUBPART F—STATE ADMINISTRATION

This subpart has been expanded with requirements set out under the major headings: State Educational Agency Responsibilities, Use of Funds, and State Advisory Panel.

STATE EDUCATIONAL AGENCY RESPONSIBILITIES

Provisions on State educational agency responsibilities have been redrafted (and relocated from proposed section 121a.34) in response to comments, to better summarize general administrative and supervisory responsibilities in section 612(6) and other sections of the Act. A section on complaint procedures, which was included in previous regulations for Part B (prior section 121a.14) and inadvertently not included in the proposed regulations has been added.

Comment: Commenters requested addition of a new section on State educational agencies' responsibilities for monitoring, evaluation, and enforcement activities to insure compliance throughout the State with the requirements of this part. The commenters made specific suggestions for implementing such a section, including collection of data, conduct of on-site visits, audit of fund utilization, comparison of written individualized education programs with programs actually provided, meetings with parents and parent groups, public hearings, development of detailed criteria for evaluating program quality and effectiveness, and detailed procedures for enforcing requirements against noncomplying agencies.

Response: A new section has been added to require each State educational agency to develop procedures and specific timelines for monitoring and evaluating public agencies involved in the education of handicapped children. These are minimal requirements. Adoption of the other suggestions made by the commenters is encouraged but not required.

ALLOWABLE COSTS (§ 121a.621)

Comment: A number of commenters requested that the limitation on State administrative funds be raised and that provisions be added to allow local educational agencies to use funds for administrative costs.

Response: No change has been made on the State limit as it is a statutory limitation.

Comment: Commenters requested that the regulations require each State educational agency to use its funds for specific purposes. One recommendaiton was that ten percent of the administrative funds be used to train persons in local communities to assist and represent parents and to prepare and disseminate to parents information about their rights under these regulations. Another was that they be used to disseminate instructional material.

Response: No change has been made. The Office of Education does not believe it is appropriate to dictate to States how to use their limited administrative funds.

STATE ADVISORY PANEL

ESTABLISHMENT (§ 121a.650)

Comment: One commenter recommended that local panels be required.

Response: No change has been made. The statute only requires a State advisory panel. A State may, of course, decide to establish local panels.

MEMBERSHIP (§121a.651)

Comment: A substantial number of commenters requested additions to the list of representatives to be included on the panel, including professional groups, legal advocacy groups, and employees of State and local agencies. Some commenters recommended that handicapped individuals or their parents make up specific percentages of the panel.

Response: A provision has been added to make it clear that a State may expand the advisory panel to include additional persons in the groups listed (which are statutory) and representatives of other groups. The Office of Education does not believe it is appropriate to prescribe specific percentages, as the States should have some discretion to determine the proper mix of representatives. A comment has been added to indicate factors a State may consider in determining balanced membership of the panel.

ADVISORY FUNCTIONS AND ADVISORY PANEL PROCEDURES (§§ 121a.652—121a.653)

Comment: Commenters recommended that the regulations indicate that the panel must comment publicly on the State annual program plan as well as on any rules and regulations regarding education of handicapped children, review annual evaluations, and act as ombudspersons to hear complaints.

Response: A change has been made to require the panel to comment on the annual program plan. The annual program plan is an extremely important document and this addition makes it clear that the advisory panel must be involved in reviewing it. The other recommendations are legitimate activities but not ones the Federal government believes should be required by these regulations at this time.

Comment: Commenters requested that the regulations provide that panel members be reimbursed for reasonable and necessary expenses for attending meetings and performing duties.

Response: This change has been made. It is reasonable to require reimbursement for expenses so that persons will be able to participate without financial sacrifice.

SUBPART G—ALLOCATIONS OF FUNDS; REPORTS

ALLOCATIONS

This major section of Subpart G is entirely statutory; therefore, there are no comments of substance on which to respond.

REPORTS—ANNUAL REPORT OF CHILDREN SERVED (§§ 121a.750–121a.754)

The following comments were received regarding the annual report by the States of the number of children receiving special education and related services. This report is the basis for each State's allocation of funds under Part B, and serves as a mechanism for the Commissioner to meet some of his reporting requirements to Congress under section 618 of the Act. Some commenters recommended changes that would require amendment of the Act. These have not been summarized except where further explanation seemed to be useful.

AMOUNT OF INFORMATION REQUIRED IN THE REPORT

Comment: Commenters varied in their views on what information should be included in the report. It was suggested that additional information be collected for compliance purposes. Objections were made to the requirement for reporting information by disability category, and for reporting the 0-2 year old population. On the other hand, some commenters recommended that additional categories be added to the report, particularly for deaf-blind children and for multihandicapped children.

Response: Two categories of handicapped children have been added to the report—one for multihandicapped children and one for deaf-blind children. These terms are defined in section 121a.5 of Subpart A. No other changes have been made on the amount of information to be reported.

The additional categories should help to insure that no handicapped child is counted more than once, since the States will not have to decide in which of two or more disability categories to count a multihandicapped child. The changes conform to existing reporting requirements used by the States.

The annual report of children served is not a compliance document. It is only used to determine each State's allocation and to assist the Commissioner in meeting his reporting requirements to the Congress under section 618. Under section 611 of the Act, allocations are based on the number of handicapped children in each State receiving special education and related services. Compliance with requirements such as "least restrictive environment" will be achieved through other mechanisms, including the State's annual program plan, the local educational agency's application, and monitoring by the State educational agency and the Office of Education.

As explained in the preamble to the proposed rules published in the FEDERAL REGISTER on September 8, 1976, the report requirements are the minimum needed by the Commissioner to carry out the Act. (See 41 FR 37814.) While the Commissioner is concerned about the possible harmful effects of "labeling" children, the Act requires that the Commissioner report a substantial amount of information, to Congress by disability category. For this reason, and for the other reasons stated in the September 8, 1976, FEDERAL REGISTER, there appears to be no workable alternative to retaining the categories in the States' annual reports. The various disability categories, as well as the requirements to use them in the Commissioner's reports to the Congress, are statutory.

WHO MAY BE COUNTED

Comment: Commenters disagreed as to whether handicapped children should be counted if their special education is paid for solely from private sources or solely from Federal funds (such as children living on military bases). Some thought that only publicly-funded special education should qualify, while others argued that since all children have a right to a free appropriate public education the source of funding (other than the parent) should not matter.

Response: Section 121a.753 has been amended to provide that handicapped children (including such children in Head Start or other preschool programs) may be counted only if they (1) are enrolled in a school or program which is operated or supported by a public agency, and (2) receive special education that meets State standards.

A State may not count a child whose special education is paid for solely by the Federal government, unless the child is in one of the age groups 3–5 or 18–21, and there are no local or State funds available for nonhandicapped children in that age group.

Children funded solely by the Federal government would include Indian children whose special education is paid for solely by the Federal government, as well as children on military bases whose education is paid for solely with Federal funds. This rule is consistent with the requirement that a free appropriate public education (FAPE) be made available by the State to each handicapped child. Parents are not required to take advantage of FAPE. If they choose to educate their child outside of the public school system, even though FAPE is available, the State has discharged its responsibility. However, by the same token, the child should not be counted by the State for its allocation if the child is not being provided special education at public expense. The same reasoning applies to Indian children and other children who receive their special education from the Federal government. The rule should serve as an encouragement to States to provide services to all handicapped children, however, since any child provided special education from State or local funds may be counted.

Comment: Two other provisions in the regulations were objected to by commenters. The first of these provided that handicapped children "enrolled" in schools to receive special education could be counted as receiving special education. These commenters felt that enrollment did not guarantee actual receipt of services. The second provision stated, in essence, that a child who receives special education may be counted, but not a child who receives only "related services." This was viewed as an overly restrictive reading of the Act.

Response: No change has been made in the regulations. While no system is perfect, enrollment is a legitimate way of determining the number of handicapped children receiving special education on October 1 and on February 1, the two dates on which the Act requires the count of children served. It would not be practical to make an actual head count of children in classrooms and other facilities where services are provided.

With respect to children who only receive "related services," this is governed by statutory language. "Related services" are only those "required to assist a handicapped child to benefit from special education." (Section 602(17) of the Act.) If a child does not need special education, there can be no "related services," as that term is defined in the Act. However, section 121a.14 permits a State to define certain services as "special education," if those services are "specially designed instruction to meet the unique needs of a handicapped child." (This is taken from the definition of "special education" in section 602(16) of the Act.)

REALLOCATION OF LOCAL EDUCATIONAL AGENCY FUNDS (§ 121a.708)

Comment: Commenters requested criteria be added for when funds may be reallocated.

Response: No criteria have been added as determinations will be made on a case-by-case basis.

APPENDIX B—INDEX TO PART 121a

ADMINISTRATION

See: Monitoring.
Annual program plan requirements—§§ 121a.112; 121a.134; 121a.138; 121a.141; 121a.142; 121a.145.
Certification of State authority—§ 121a.112.
Direct Service by State educational agency—§ 121a.360.
Local application requirements—§§ 121a.228; 121a.236; 121a.240.
Local education agency definition—§ 121a.8.
State administration—Subpart F.

ADVISORY PANEL (STATE)

Annual program plan requirement—§ 121a.147.
General requirements—§§ 121a.650–121a.653.

ALLOCATIONS

Annual program plan condition of assistance—§ 121a.110.
Application by local agency condition of assistance—§ 121a.180.
Consolidated applications—§ 121a.191.
Count of children—See Reports.
Interior Department for Indian children—§ 121a.709.
Local agency allocation—See Reports.
Formula—§§ 121a.705–121a.707.
Reallocation—§ 121a.708.
Use by the State—§ 121a.360.
Outlying areas—§ 121a.710.
Recovery for misclassified children—§ 121a.141.
State allocation:
Formula—§§ 121a.701–121a.703; 121a.705–121a.706.
Hold harmless—§ 121a.704.
Use for administration—§§ 121a.620–121a.621.
Use of—See other headings.
Withholding—See: Hearings.
From the local agency—§ 121a.194.
From the State—§§ 121a.590–121a.593.

ANNUAL PROGRAM PLAN

Approval; disapproval—§ 121a.113.
Certifications—§ 121a.112.
Condition of assistance to State—§ 121a.110.
Contents—§§ 121a.111; 121a.112; 121a.120–121a.151.
Effective period—§ 121a.114.
General requirements—§§ 121a.110–121a.114.
Public participation—See: Public Participation.
Submission by State—§ 121a.110.

APPLICABILITY OF REGULATIONS—§ 121a.2

APPLICATION BY LOCAL AGENCY

Annual program plan requirement—§ 121a.144.
Approval or disapproval by State educational agency—§§ 121a.193; 121a.360.

Second priority children—amendment of application—§ 121a.324.
Submission by local agency—§ 121a.180.
Condition of assistance to local agency—§ 121a.180.
Consolidated application—§§ 121a.190–121a.192.
Content—§§ 121a.220–121a.240.
Excess costs—See: Excess Costs.
Public participation—See Public Participation.

AUDITS

See: Monitoring.

COMPLAINTS

State educational agency procedures—§ 121a.602.
See: Hearings.

COMPARABLE SERVICES

Local application requirement—§ 121a.231.

CONSENT

Defined—§ 121a.500.
Disclosure of information—§ 121a.571.
Initial placement—§ 121a.504(b).
Placement status during a proceeding—§ 121a.513.
Preplacement evaluation of child—§ 121a.504(b).

CONFIDENTIALITY OF INFORMATION

Annual program plan requirement—§ 121a.129.
Definitions—§ 121a.560.
General requirements—§§ 121a.560–121a.572.
Local application requirements—§ 121a.221.

CONSOLIDATED APPLICATIONS

See: Application of local agency.

COUNT OF CHILDREN

Annual report of children served—§§ 121a.750–121a.754.
Allocations:
State entitlement—§§ 121a.701–121a.702.
Local educational agency entitlement—§ 121a.707.
Outlying areas entitlements—§ 121a.710.

DEFINITIONS—§§ 121a.4–121a.15

DUE PROCESS

See: Confidentiality of Information.
Evaluation.
Hearings.
Notice.
Procedures for parents and children—§§ 121a.500–121a.514.

EDUCATION

See: Free Appropriate Public Education.
Full Educational Opportunity Goal.
Individualized Education Program.
Personnel Development.
Physical Education.
Special Education.
Related Services.

EVALUATION

Advisory panel function—§ 121a.652.
Annual program plan requirements—§§ 121a.128; 121a.133; 121a.146.
Education programs—§ 121a.146.
Handicapped children:
Consent required for—§ 121a.504.
Defined—§121a.500.
Hearings—See Hearings.
Independent educational evaluation—§ 121a.503.
Information on achievement—§ 121a232.
Notice required—§§ 121a.504–121a.505.
Protection—§§ 121a.129, 121a.133, 121a.221, 121a.530–121a.534.
State responsibility—§ 121a.128.
Hearing aids—§ 121a.308.
Individualized education programs—§ 121a.146.
Personnel development—§ 121a.386.
Private school children service needs—§ 121a.453.
State educational agency activities—§§ 121a.146; 121a.601.
Training—See: Personnel development, this heading.

EXCESS COSTS

Generally—§§ 121a.182–121a.186.
Local application requirement—§ 121a.229.
Not applicable to State educational agency—§ 121a.360.

FREE APPROPRIATE PUBLIC EDUCATION

See: Individualized Education Programs.
Related Services.
Special Education.
Time Limits and Timetables.
Annual program plan requirements—§§121a.121–121a.122.
Defined—§ 121a.4.
Generally—§§ 121a.300–121a.303; 121a.307.
Initiation or change—See: Notice.
State practice exception—§ 121a.300.
State use of local agency's allocation—§ 121a.360.
Priorities—§§ 121a.320–121a.324.

FULL EDUCATIONAL OPPORTUNITY GOAL

Annual program plan requirements—§§ 121a.123–121a.126.
General requirements—§§ 121a.304–121a.306.
Local application requirements—§§ 121a.222–121a.223.

HANDICAPPED CHILDREN

Defined—§ 121a.5.

Rights

See: Confidentiality of Information.
Due Process.
Evaluation.
Free Appropriate Public Education.
Hearing.
Identification, Location, Evaluation.
Individualized Education Program.
Least Restrictive Environment.
Notice.
Private School Children.
Special Education.
Related Services.

HEARINGS

Disapproval of annual program plan—§ 121a.113.
Disapproval of local application—§ 121a.194.
Office of Education procedures—§§ 121a.580–121a.593.
Parents and children:
Identification, evaluation, placement—§§ 121a.506–121a.514.
Confidentiality of information—§§ 121a.568–121a.570.
Public hearings before adopting annual program plan—§§ 121a.280–121a.284.
Withholding payments from a State—§ 121a.590.

IDENTIFICATION, LOCATION, EVALUATION

See: Evaluations.
Annual program plan requirement—§ 121a.128.
Local application requirement—§ 121a.220.
Private school children—§ 121a.453.

INDIAN CHILDREN

Application from Secretary of Interior—§§ 121a.260–121a.263.
Count—§§ 121a.753.
Payments to Secretary of Interior—§ 121a.709.

INDIVIDUALIZED EDUCATION PROGRAM

Accountability—§ 121a.349.
Annual program plan requirement—§ 121a.130.
Content—§ 121a.346.
Defined—§ 121a.340.
Effective dates—§ 121a.342.
First priority children—§ 121a.322.
Free appropriate public education definition—§ 121a.4.
General requirements—§§ 121a.340–121a.349.
Least restrictive environment—§ 121a.552.
Local application requirement—§ 121a.235.
Meetings—§§ 121a.343–121a.345.
Parent participation—§ 121a.344.
Placement—§§ 121a.533; 121a.552.
Private school children—§§ 121a.347–121a.348; 121a.401.
Reevaluation—§ 121a.534.

LEAST RESTRICTIVE ENVIRONMENT

Annual program plan requirement—§ 121a.132.
General requirements—§§ 121a.550–121a.556.
Local application requirement—§ 121a.227.
Nature and location of State services—§ 121a.361.
Nonacademic services and settings—§§ 121a.306; 121a.553.
Physical education—§ 121a.307.
Placement decisions—§§ 121a.513; 121a.533.
Program options—§ 121a.305.

MATCHING—§ 121a.371

MONITORING

Annual program plan requirements—§§ 121a.128(b)(5); 121a.130(b)(2); 121a.135.
Auditing count of children served—§ 121a.754.
Confidentiality of information—§ 121.575.
Identification, location, evaluation—§ 121a.128(b)(5).
Individualized education programs—§ 121a.130(b)(2).
Least restrictive environment—§ 121a.556.
Private school children—§ 121a.402(a).
State educational agency responsibility—§ 121a.601.

NONDISCRIMINATION

Annual program requirement—§ 121a.150.
Evaluation materials and procedures—§ 121a.530.
Local application requirement—§ 121a.239.
Nonacademic services—§ 121a.306.
Private school children—§ 121a.458.
Program options—§ 121a.305.
Testing materials and procedures—§ 121a.530.

NOTICE

Confidentiality of information—§§ 121a.561, 121a.573.
Individualized education program meeting—§ 121a.345.
Intitiation or change of identification, evaluation, placement, or free appropriate public education—§§ 121a.504–121a.505.
Notice of opportunity for a hearing—See: Hearings.
Notice of procedural safeguards—§ 121a.505.
Public notice of withholding payments—§ 121a.592.

PERSONNEL DEVELOPMENT

Annual program plan requirement—§ 121a.139.
Comprehensive system of personnel development—§§ 121a.380–121a.387.
Included in State support services—§ 121a.370.
Least restrictive environment—§ 121a.555.
Local application requirement—§ 121a.224.
Personnel needs—§§ 121a.126; 121a.223.
Preservice training—§ 121a.321.

Trained personnel for evaluation materials—§ 121a.532.
Training regarding confidentiality of information—§ 121a.572.
Use of Part B funds for training—§§ 121a.321, 121a.322.

PHYSICAL EDUCATION

Included in special education—§ 121a.14.
Required—§ 121a.307.

PLACEMENTS

See: Evaluation.
Least Restrictive Environment.
Private schools.

PRIORITIES

See: Evaluation.
Indentification, Location, Evaluation.
Annual program plan requirement—§ 121a.127.
Definitions:
First priority children—§ 121a.320(a).
Second priority children—§ 121a.320(b).
General requirements—§§ 121a.320–121a.324.
Local application requirement—§ 121a.225.
State direct and support services—§ 121a.370.

PRIVATE SCHOOL CHILDREN

Annual program plan requirement—§ 121a.140.
Confidentiality of information—§ 121a.560.
Cost of residential placement—§ 121a.302.
Handicapped children placed or referred by public agencies—§§ 121a.400–121a.403.
Handicapped children not placed or referred by public agencies—§§ 121a.450–121a.460.
Individualized education program—§§ 121a.347–121a.348.
Least restrictive environment—§ 121a.554.
Part B applicability to private schools—§ 121a.2.
Physical education—§ 121a.307.

PROCEDURAL SAFEGUARDS

See: Complaints.
Consent.
Hearings.
Notice.
Surrogate Parents.
Annual program plan requirements—§§ 121a.131; 121a.136.
Local application requirement—§ 121a.237.

PUBLIC PARTICIPATION

See: Hearings.
Annual program plan requirements—§§ 121a.120; 121a.137; 121a.280–121a.284.
Local application requirements—§§ 121a.226; 121a.234.
Secretary of Interior application—§ 121a.261.
State advisory panel—§§ 121a.650–121a.654.

RECORDS

See: Confidentiality of Information.
Annual program plan requirement—§ 121a.143.
Comparable services—§ 121a.231.
Count of children served—§ 121a.754.
Excess costs—§ 121a.183.
Individualized education programs—§ 121a.130.
Local application requirement—§ 121a.233.
Parents may examine—§ 121a.502; 121a.562.
Parents not participating in meetings—§ 121a.345.

RELATED SERVICES

See: Free Appropriate Public Education.
Individualized Education Program.
Defined—§ 121a.13.

REPORTS

Annual report of children served—§§ 121a.750–121a.754.
Local application requirements—§§ 121a.232; 121a.233.
State advisory panel—§ 121a.652.

SPECIAL EDUCATION

See: Free Appropriate Public Education.
Individualized Education Program.
Defined—§ 121a.14.

STATE ADVISORY PANEL

Annual program plan requirement—§ 121a.147.
General requirements—§§ 121a.650–121a.653.

STATE DIRECT AND SUPPORT SERVICES

Annual program plan requirement—§ 121a.51.
General requirements—§§ 121a.360–121a.372.

SUPPLANTING

Applicability to State educational agency—§ 121a.372.
Local application requirement—§ 121a.230.
Private schools—§ 121a.460.
Waiver of requirement—§ 121a.589.

SURROGATE PARENTS

Definition of parent—§ 121a.10.
Duty of public agency to assign—§ 121a.514.
Responsibilities—§ 121a.514.
Selection—§ 121a.514.

TESTING

See: Evaluation.

TIME LIMITS AND TIMETABLES

Annual program plan effective period—§ 121a.114.
Evaluation of educational programs—§ 121a.146.
Free appropriate public education—§§ 121a.122; 121a.300.
Full educational opportunity goal—§§ 121a.125; 121a.222.
Hearing decisions—§§ 121.512; 121a.583.
Individualized education programs—§§ 121a.342; 121a.343.
Public participation in the annual program plan—§ 121a.280–121a.284.
Reevaluation—§ 121a.534.
Report of children served—§ 121a.750–121a.754.
State monitoring of public agencies—§ 121a.601.
State review of hearing decision—§ 121a.512.

TRAINING

See: Personnel Development.

USE OF PART B FUNDS

Allocation formulas:
Consolidated applications—§§ 121a.190–121a.191.
Entitlements—§§ 121a.700–121a.710.
Annual program plan requirements—§§ 121a.148; 121a.149.
Department of the Interior (Indian children)—§ 121a.262.
Excess costs—§§ 121a.182–121a.186.
Local application requirement—§ 121a.238.
State and local educational agencies:
Free appropriate public education—§§ 121a.301–121a.302.
Full educational opportunity goal—§ 121a.304(b).
Priorities—§§ 121a.320–121a.324.
Private school children—§§ 121a.450–121a.460.
State educational agencies:
Allowable costs—§ 121a.621.
Federal funds for State administration—§ 121a.620.
Matching—§ 121a.371.
State advisory panel—§ 121a.652.
Use of local allocation for direct services—§§ 121a.360–121a.361.
Use of State educational agency allocation for direct and support services—§ 121a.370.
Supplanting—§§ 121a.230; 121a.372; 121a.589.
Training—See: Personnel Development.

5 A new Part 121m is added to read as follows:

PART 121m—INCENTIVE GRANTS

Sec.
121m. 1 Scope; purpose.
121m. 2 General provisions regulations.
121m. 3 Eligibility.
121m. 4 Application.
121m. 5 Application contents.
121m. 6 Amount of grant.
121m. 7 Participation by children not counted under Part B of the Act.
121m. 8 Excess costs.
121m. 9 Administration.
121m. 10 Annual evaluation report.

AUTHORITY: Sec. 619 of Pub. L. 91-230, as amended, 89 Stat. 793 (20 U.S.C. 1419), unless otherwise noted.

§ 121m.1 Scope; purpose.

(a) This part applies to assistance under section 619 of the Act.

(b) The Commissioner awards a grant to each State which provides special education and related services to handicapped children ages three, four, or five.

(c) The State shall use funds provided under this part to give special education and related services to handicapped children in the age groups named in paragraph (b) of this section.

(d) The terms "special education" and "related services" have the meanings defined in § 121a.12 and § 121a.13 of this chapter.

(20 U.S.C. 1419(c).)

§ 121m.2 General provisions regulations.

Assistance under this part is subject to the requirements in Parts 100, 100b, 100c, and 121 of this chapter (including definitions and fiscal, administrative, property management, and other matters).

(20 U.S.C. 1419.)

§ 121m.3 Eligibility.

A State is eligible to receive a grant if:

(a) The Commissioner has approved its annual program plan under Part 121a of this chapter; and

(b) The State provides special education and related services to any handicapped children aged three, four, or five.

(20 U.S.C. 1419(a).)

§ 121m.4 Application.

To receive funds under this part, a State must submit an application to the Commissioner through its State educational agency.

(20 U.S.C. 1419(b).)

§ 121m.5 Application contents.

An application must include the following material:

(a) A description of the State's goals and objectives for meeting the educational needs of handicapped children ages three through five. These goals and objectives must be consistent with the State's full educational opportunity goal under § 121a.123 of this chapter.

(b) A description of the objectives to be supported by the grant in sufficient

detail to determine what will be achieved with the grant.

(c) A description of the activities to be supported by the grant. The activities must be related to the objectives under paragraph (b) of this section and must be described in sufficient detail to determine how the grant will be used.

(d) A description of the impact the proposed activities will have on handicapped children ages three through five. This description must include evidence that the proposed activities are of sufficient size, scope, and quality to warrant the amount of the expenditure. The application must indicate the number of children to be served and the number of handicapped children who will be benefitted indirectly. If children are to be benefitted indirectly, there must be a rationale that demonstrates the benefit.

(e) The number of local educational agencies or intermediate educational units, and the number and names of other agencies which will provide contractual services under the grant, the activities they will carry out, and the reasons for selecting these agencies.

(f) The dollar amounts that will be spent for each major activity described.

(g) A description of the procedures the State will use to evaluate the extent to which the activities met the objectives described under paragraph (b) of this section.

(20 U.S.C. 1419(b).)

§ 121m.6 Amount of grant.

(a) The amount of a grant is $300 multiplied by the average number of children ages three through five counted during the current school year under §§ 121a.750–121a.754 of this chapter.

(b) If appropriated funds are less than enough to pay in full the grants under this part, the amount of each grant is ratably reduced.

(20 U.S.C. 1419(a), (d).)

§ 121m.7 Allowable expenditures.

(a) The State educational agency may use funds under this part to give special education and related services to handicapped children ages three through five who are not counted under §§ 121a.750–121a.754 of this chapter if the State educational agency insures that those children have all of the rights afforded under part 121a of this chapter.

(b) The State educational agency may use up to five percent of its grant for the costs of administering the funds provided under this part.

(20 U.S.C. 1419(c).)

Comment. In carrying out the provisions of this part some activities are considered particularly appropriate for the use of these funds: (1) Providing parents with child development information; (2) assisting parents in the understanding of the special needs of their handicapped child; (3) providing parent counseling and parent training, where appropriate, to enable parents to work more effectively with their children; (4) providing essential diagnosis and assessment; (5) providing transportation essential to the delivery of services; (6) providing speech therapy, occupational therapy, or physical therapy.

§ 121m.8 Excess costs.

(a) If local or State funds are available to pay for the education of nonhandicapped children of the same age as the handicapped children served with funds under this part, funds equal to that amount must also be made available for these handicapped children.

(b) If no local or State funds are available for nonhandicapped children of the same age, funds under this part may be used to pay for all of the costs directly attributable to the education of the handicapped children.

(20 U.S.C. 1419(c).)

§ 121m.9 Administration.

(a) The State educational agency shall administer the funds provided under this part.

(b) The State educational agency may use the funds itself, or may contract with local educational agencies, intermediate educational units, or other agencies.

(20 U.S.C. 1419(a).)

§ 121m.10 Annual evaluation report.

(a) Within 90 days after the end of the grant period, the State educational agency shall submit a report to the Commissioner on the activities carried out under this part during that period.

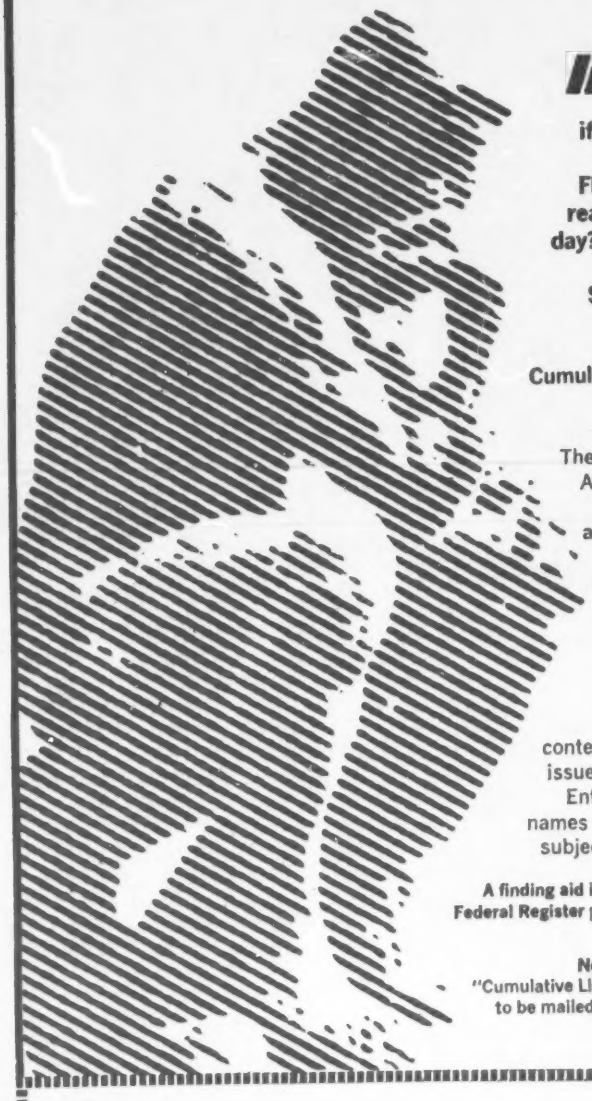
(b) The report must contain:

(1) The results of the evaluation under § 121m.5(g), and

(2) In brief narrative form, the impact that these funds have had on the State's educational services to handicapped children ages three, four, and five.

(20 U.S.C. 1419(c).)

[FR Doc.77-24033 Filed 8-22-77;8:45 am]



would you like to know

if any changes have been made in certain titles of the CODE OF FEDERAL REGULATIONS without reading the Federal Register every day? If so, you may wish to subscribe to the "Cumulative List of CFR Sections Affected," the "Federal Register Index," or both.

Cumulative List of CFR Sections Affected
$10.00
per year

The "Cumulative List of CFR Sections Affected" is designed to lead users of the Code of Federal Regulations to amendatory actions published in the Federal Register, and is issued monthly in cumulative form. Entries indicate the nature of the changes.

Federal Register Index $8.00
per year

Indexes covering the contents of the daily Federal Register are issued monthly, quarterly, and annually. Entries are carried primarily under the names of the issuing agencies. Significant subjects are carried as cross-references.

A finding aid is included in each publication which lists Federal Register page numbers with the date of publication in the Federal Register.

Note to FR Subscribers: FR Indexes and the "Cumulative List of CFR Sections Affected" will continue to be mailed free of charge to regular FR subscribers.

Mail order form to:
Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402

There is enclosed $_____ for _____ subscription(s) to the publications checked below:

..... **CUMULATIVE LIST OF CFR SECTIONS AFFECTED ($10.00 a year domestic; $12.50 foreign)**

..... **FEDERAL REGISTER INDEX ($8.00 a year domestic; $10.00 foreign)**

Name _____

Street Address _____

City _____ **State** _____ **ZIP** _____

Make check payable to the Superintendent of Documents

☆ GPO: 1979—O-58-000

Federal Register

THURSDAY, DECEMBER 29, 1977
PART III

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Office of Education

■

ASSISTANCE TO STATES FOR EDUCATION OF HANDICAPPED CHILDREN

Procedures for Evaluating Specific Learning Disabilities

[4110-02]

Title 45—Public Welfare

CHAPTER I—OFFICE OF EDUCATION, DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

PART 121a—ASSISTANCE TO STATES FOR EDUCATION OF HANDICAPPED CHILDREN

Procedures For Evaluating Specific Learning Disabilities

AGENCY: Office of Education, HEW.

ACTION: Final rule.

SUMMARY: These regulations provide procedures for evaluating specific learning disabilities. The regulations supplement basic evaluation requirements under the regulations for part B of the Education of the Handicapped Act which were published August 23, 1977. Upon the effective date of these regulations, the two percent limit (the "cap") on the number of children with specific learning disabilities who may be counted for allocation purposes under part B is removed.

EFFECTIVE DATE: As required by section 431(d) of the General Education Provisions Act, as amended (20 U.S.C. 1232(d)), these amendments have been transmitted to Congress concurrently with publication in the FEDERAL REGISTER. That section provides that regulations subject thereto shall become effective on the forty-fifth day following the date of transmission, subject to the provisions concerning Congressional action and adjournment.

FOR FURTHER INFORMATION CONTACT:

Daniel Ringelheim, Director, Division of Assistance to States, Bureau of Education for the Handicapped, 400 Maryland Avenue SW. (Room 4046, Donohoe Building), Washington, D.C. 20202. Telephone: 202-472-2265.

Or

Frank S. King, State Plan Officer, Field Services Branch, Division of Assistance to States, Bureau of Education for the Handicapped, 400 Maryland Avenue SW., (Room 4946, Donohoe Building), Washington, D.C. 20202. Telephone: 202-245-9815.

SUPPLEMENTARY INFORMATION:

RULEMAKING HISTORY—PUBLIC PARTICIPATION

Because of the potential impact that these regulations could have on the education of specific learning disabled (SLD) children throughout the Nation, and on the agencies that serve them, the Office of Education recognized the need for intensive public participation in the development of the regulations, and has taken steps to insure maximum public involvement throughout the entire rulemaking process. Experts and citizens representing advocate groups, including parents and professionals, were invited to participate in meetings where the primary issues regarding the development of these regulations were identified and discussed.

Following the series of meetings, a draft concept paper was developed. The concepts contained in that paper were shared at a special meeting with State educational agency representatives from 34 States. The purpose of this activity was to attempt to ascertain if the concepts contained in the draft paper presented any major philosophical and implementation problems for States.

On November 29, 1976, the proposed rules were published in the FEDERAL REGISTER (41 FR 52404). Written comments and recommendations on the proposed rules were invited for a 120 day comment period. Public hearings were held in Washington, San Francisco, Denver, Chicago, Boston, and Atlanta during that period. This comment period on the proposed regulations extended beyond the period of the annual international conference of the Association for Children with Learning Disabilities, where the proposed regulations were a major topic of both presentations and discussions at that conference. Many sessions on the proposed regulations were conducted by Office of Education personnel and others. During the comment period, over 980 letters were received. In addition 88 formal presentations were made at the hearings. All written and verbal comments were reviewed and considered by the Office of Education in preparing these final regulations.

The tapes of the hearings and copies of written comments are available for public inspection at the Bureau of Education for the Handicapped, Room 4921, Donohoe Building, 400 6th Street SW., Washington, D.C. 20202.

SUMMARY OF PROCEDURES FOR EVALUATING SPECIFIC LEARNING DISABLED CHILDREN

These regulations have been developed to comply with section 5(b) of Pub L. 94-142, which required the Commissioner to develop procedures for evaluating children who have a specific learning disability (SLD). Upon the effective date of these SLD regulations, they will be incorporated into the general regulations under part B of the Education of the Handicapped Act published in August (45 CFR Part 121a).

The part B regulations set out basic procedures which public agencies are required to use in evaluating all handicapped children, including, for example, the following requirements: (1) That tests and other evaluation materials are provided and administered in the child's native language or other mode of communication; (2) That no single procedure is used as the sole criterion for determining an appropriate educational program for a child; and (3) That the evaluation is made by a multidisciplinary team including at least one teacher or other specialist with knowledge in the area of suspected disability.

These SLD regulations set out additional procedures which apply only to the evaluation of children suspected of having a specific learning disability. Following is a summary of these additional requirements:

First, the multidisciplinary team must include the child's regular teacher. (If the child has no regular teacher, a person qualified to teach a child of that age would be assigned to the team.) The team also must include a person qualified to conduct individual diagnostic examinations. (Within the SLD population, there are children who primarily display problems of language development. For this population, qualified specialists in speech and language disorders represent an appropriate professional resource.)

Second, criteria are set out for use by the team in determining the existence of a specific learning disability. This determination is made based on (1) whether a child does not achieve commensurate with his or her age and ability when provided with appropriate educational experiences, and (2) whether the child has a severe discrepancy between achievement and intellectual ability in one or more of seven areas relating to communication skills and mathematical abilities.

These concepts are to be interpreted on a case by case basis by the qualified evaluation team members. The team must decide that the discrepancy is not primarily the result of (1) visual, hearing, or motor handicaps; (2) mental retardation; (3) emotional disturbance; or (4) environmental, cultural, or economic disadvantage.

The regulations also set out procedures for observing the child's performance and for preparing a written report of the results of the evaluation.

MAJOR CHANGES FROM PROPOSED REGULATIONS

The following major changes have been made from the proposed regulations:

(1) The formula has been deleted;

(2) The "50 percent" figure for determining "severe discrepancy" has been deleted;

(3) Provisions duplicating requirements in final regulations for general evaluation procedures and for medical examinations under Part B have been deleted.

(4) The monitoring sections have been deleted, since State educational agency (SEA) monitoring responsibilities are covered under § 121a.601 of the Part B regulations. The Commissioner has established these detailed monitoring responsibilities of the SEAs and will monitor each State's compliance with these and other requirements of Part B.

The statute provides that when these final regulations take effect, the two percent cap on the number of children with specific learning disabilities who may be counted for allocation purposes is removed (section 5(c)). Therefore, § 121a.702(a)(2) of the Part B regulations, which repeated the statutory cap requirement, is deleted.

ACTION TAKEN OF PUBLIC COMMENTS

The Office of Education conducted a careful review of the public comments received and summarized them by topic.

Of the 982 letters of comment and 88 presenters at the public hearings, the most frequently expressed concern was with the inclusion of the use of a formula as a part of the diagnostic criteria. With the exception of the composition of the evaluation team, there were relatively few comments on other portions of the proposed regulations.

Only a few commenters made suggestions for a different approach to be used to determine the existence of specific learning disabilities. Each of these suggestions was determined to be inappropriate for use in these regulations because it was based on unproven theories or on current practice for which no professional consensus is available.

ANALYSIS OF REGULATIONS

The appendix to the Part B regulations is amended by (1) a discussion of significant comments received on these regulations and the action taken with respect to those comments, and (2) an explanation of the basis for any changes made from the proposed rules published on November 29, 1976.

TECHNICAL CORRECTIONS TO PART 121a REGULATIONS PUBLISHED ON AUGUST 23, 1977

(1) In the definition of "specific learning disability" (§ 121a.5(b)(9)), the phrase "of emotional disturbance" was inadvertently omitted. This has been corrected, and the revised definition is set out in amendment No. 1, below.

(2) The following comment and response regarding Civil Action is contained in the Part 121a Regulations published on August 23, 1977:

CIVIL ACTION (§ 121a.511)

Comment: Commenters wanted the regulations revised to allow for direct appeal to the courts without first using administrative hearing and review procedures if these procedures would be futile, the timeliness or adequacy of the administrative proceedings are being challenged, or a class action is involved. Commenters cited language in the Congressional Record in support of this interpretation (121 Cong. Rec. S20433 daily ed., November 19, 1975).

Response: No change has been made. The legislative history cited is nongermane as it was made in reference to the Senate Bill (S. 6) which did not contain the final statutory provision on civil actions. The provision on civil action was added as a Conference substitute. The issue of exhaustion of remedies will be up to the courts to resolve.

The statement made by the Office of Education regarding the legislative history cited by the commenter was incorrect, since the legislative history referred to occurred during consideration of the Conference Report. Therefore, a correction has been made to that statement, as set out in amendment No. 4, following.

NOTE—The Office of Education has determined that this document does not contain a major proposal requiring preparation of an Economic Impact Analysis (previously referred to as an Inflationary Impact Statement) under Executive Order 11821 and OMB Circular A-107.

(Catalog of Federal Domestic Assistance Number 13.449, Education of Handicapped Children, Part B.)

Dated: October 18, 1977.

ERNEST L. BOYER,
U.S. Commissioner of Education.

Approved: December 19, 1977.

JOSEPH A. CALIFANO, Jr.,
Secretary of Health, Education, and Welfare.

Part 121a of Title 45 of the Code of Federal Regulations is amended as follows:

1. Section 121a.5 is amended by revising paragraph (b)(9) to read as follows:

§ 121a.5 Handicapped Children.

* * * * * *

(b) * * *

(9) "Specific learning disability" means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which may manifest itself in an imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations. The term includes such conditions as perceptual handicaps, brain injury, minimal brain disfunction, dyslexia, and developmental aphasia. The term does not include children who have learning problems which are primarily the result of visual, hearing, or motor handicaps, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage.

* * * * * *

§ 121a.702 [Amended]

2. Section 121a.702 is amended by deleting paragraph (a)(2).

3. The following new sections are added:

ADDITIONAL PROCEDURES FOR EVALUATING SPECIFIC LEARNING DISABILITIES

§ 121a.540 Additional team members.

In evaluating a child suspected of having a specific learning disability, in addition to the requirements of § 121a.532, each public agency shall include on the multidisciplinary evaluation team:

(a)(1) The child's regular teacher; or

(2) If the child does not have a regular teacher, a regular classroom teacher qualified to teach a child of his or her age; or

(3) For a child of less than school age, an individual qualified by the State educational agency to teach a child of his or her age; and

(b) At least one person qualified to conduct individual diagnostic examinations of children, such as a school psychologist, speech-language pathologist, or remedial reading teacher.

(20 U.S.C. 1411 note.)

§ 121a.541 Criteria for determining the existence of a specific learning disability.

(a) A team may determine that a child has a specific learning disability if:

(1) The child does not achieve commensurate with his or her age and ability levels in one or more of the areas listed in paragraph (a)(2) of this section, when provided with learning experiences appropriate for the child's age and ability levels; and

(2) The team finds that a child has a severe discrepancy between achievement and intellectual ability in one or more of the following areas:

(i) Oral expression;
(ii) Listening comprehension;
(iii) Written expression;
(iv) Basic reading skill;
(v) Reading comprehension;
(vi) Mathematics calculation; or
(vii) Mathematics reasoning.

(b) The team may not identify a child as having a specific learning disability if the severe discrepancy between ability and achievement is primarily the result of:

(1) A visual, hearing, or motor handicap;
(2) Mental retardation;
(3) Emotional disturbance; or
(4) Environmental, cultural or economic disadvantage.

(20 U.S.C. 1411 note.)

§ 121a.542 Observation.

(a) At least one team member other than the child's regular teacher shall observe the child's academic performance in the regular classroom setting.

(b) In the case of a child of less than school age or out of school, a team member shall observe the child in an environment appropriate for a child of that age.

(20 U.S.C. 1411 note.)

§ 121a.543 Written report.

(a) The team shall prepare a written report of the results of the evaluation.

(b) The report must include a statement of:

(1) Whether the child has a specific learning disability;
(2) The basis for making the determination;
(3) The relevant behavior noted during the observation of the child;
(4) The relationship of that behavior to the child's academic functioning;
(5) The educationally relevant medical findings, if any;
(6) Whether there is a severe discrepancy between achievement and ability which is not correctable without special education and related services; and
(7) The determination of the team concerning the effects of environmental, cultural, or economic disadvantage.

(c) Each team member shall certify in writing whether the report reflects his or her conclusion. If it does not reflect his or her conclusion, the team member must submit a separate statement presenting his or her conclusions.

(20 U.S.C. 1411 note.)

4. Appendix A is amended as follows:

a. The response under "CIVIL ACTION (§ 121a.511)," appearing at 42 FR 42512, is amended to read as follows:

Response. No change has been made. The Office of Education has decided not to regulate on this question. The issue of exhaustion of remedies will be up to the courts to resolve.

The following paragraphs have been added immediately preceding the capital letter heading LEAST RESTRICTIVE ENVIRONMENT, appearing at 42 FR 42513:

ADDITIONAL PROCEDURES FOR EVALUATING SPECIFIC LEARNING DISABILITIES

Sections 121a.540–121a.543 provide procedures for evaluating specific learning disabilities which supplement the basic evaluation requirements set out above ("PROTECTION IN EVALUATION PROCEDURES," §§ 121a.530–121a.534). These additional procedures were written to comply with section 5(b) of Pub. L. 94–142, which required the Commissioner to develop regulations that establish (1) criteria for determining whether a particular disorder or condition may be considered a specific learning disability, (2) diagnostic procedures for use in identifying SLD children, and (3) monitoring procedures for use in determining whether public agencies are complying with the criteria and diagnostic procedures.

The following major changes have been made from the proposed regulations published on November 29, 1976 (The reasons are set forth below in the discussion of specific comments.):

(1) The formula has been deleted;

(2) The "50 percent" figure for determining "severe discrepancy" has been deleted;

(3) Provisions duplicating requirements in final regulations for general evaluation procedures and for medical examinations under Part B have been deleted.

(4) The monitoring sections have been deleted, since State educational agency (SEA) monitoring responsibilities are covered under § 121a.601 of the Part B regulations. The Commissioner has established these detailed monitoring responsibilities of the SEAs and will monitor each State's compliance with these and other requirements of Part B.

The statute provides that when these final regulations take effect, the two percent cap on the number of children with specific learning disabilities who may be counted for allocation purposes is removed (section 5(c)). Therefore, § 121a.702(a)(2) of the Part B regulations, which repeated the statutory cap requirement, is deleted.

The following comments were made regarding the SLD proposed regulations:

USE OF FORMULA

Comment. Many commenters objected to the formula proposed for establishing a severe discrepancy between ability and achievement. Their concerns fell primarily into four areas:

(1) The inappropriateness of attempting to reduce the behavior of children to numbers;

(2) The psychometric and statistical inadequacy of the procedure;

(3) The fear that use of the formula might easily lend itself to inappropriate use to the detriment of handicapped children;

(4) The inappropriateness of using a single formula for children of all ages, particularly pre-school children.

Response. The formula has been deleted. Because of the above and other concerns, the Office of Education conducted a study to determine the effectiveness of the formula. While the findings showed that the formula has a certain degree of operational validity, they also identified pronounced technical limitations in its application, including all four concerns listed above.

Given the type and number of technical limitations, it has been determined that the formula should not be included in the final regulations.

Comment. A few commenters recommended alternative formulae for use in determining the existence of a severe discrepancy between ability and achievement.

Response. None of these formulae were adopted. Each was found to have the same types of technical limitations as the formula in the proposed rules.

USE OF OTHER APPROACHES

Comment. A few commenters suggested other approaches to defining specific learning disabilities. Among the suggestions for alternate approaches were those which:

(1) Required that a major discrepancy between verbal and performance scores on the WISC be established in order for a child to be considered as having a specific learning disability;

(2) Required that each area of information processing be subdivided into discrete functions and analyzed in terms of their effects on achievement. If the areas of discrepant functioning were determined to be critical to successful achievement, then a child could be considered as having a specific learning disability.

Response. Neither of these alternative approaches has been adopted. It was determined that the approaches could not be validated without engaging in extensive additional research.

COMPOSITION OF THE EVALUATION TEAMS

Comment. Many commenters had recommendations for requiring additional participants on the evaluation team. This was particularly true of speech and language pathologists who stated that a high percentage of children evaluated for specific learning disabilities have speech and language problems. A significant number of comments on the topic of the team composition were received from members of the field of reading as well.

Response. The general requirements for evaluation in § 121a.532 provide for appropriate selection of individuals to serve on the multi-disciplinary team. Therefore, no substantive change was made. For children with language and speech problems as part of, or associated with, specific learning disabilities, speech and language pathologists represent an appropriate professional resource.

Comment. Some commenters wanted the parents of the child in question to be part of the evaluation team.

Response. No change has been made. The comprehensive evaluation of children necessarily involves the collection of a variety of information, including information from the parents concerning their perceptions of the child's behavior. Such a practice is considered routine and basic to any evaluation and therefore unnecessary to be specifically listed. It might be emphasized that parents have the right under other sections of these Part B regulations to (1) participate in the development of the individual education program of their child, (2) request a due process hearing in the event they disagree with the findings of the evaluation team, (3) have access to all records pertaining to their child, and (4) have other due process safeguards.

SLD CRITERIA AND PROCEDURES

Comment. A few commenters felt that Congressional mandate in section 5(b) of Pub. L. 94–142, which required the Commissioner to establish criteria and procedures for use in identifying specific learning disabilities, was not adequately met by the regulations.

Response. The Office of Education has satisfied the Congressional mandate in the following manner:

First, criteria have been developed for determining the existence of a specific learning disability (i.e., it must be established (a) that a severe discrepancy exists between ability and achievement; (b) that there is a severe achievement problem in one or more of seven areas relating to communication skills and mathematical abilities; and (c) that the discrepancy is not the result of other known handicapping conditions or of environmental, cultural, or economic disadvantages).

Second, comprehensive diagnostic procedures have been established, which are to be used in concert with the above criteria. These procedures include (a) the basic evaluation requirements in sections 121a.530–121a.534 which must be used in evaluating all handicapped children (including those suspected of having a specific learning disability), and (b) the additional procedures (set out in §§ 121a.540–121a.543) to be used in evaluating SLD children.

Third, with respect to monitoring procedures, these are already included throughout the Part B regulations. The Commissioner has established State educational agency monitoring procedures under § 121a.601, and will monitor each State's compliance with these and other requirements of Part B.

EXCLUSION CONDITIONS

Comment. Some commenters stated that children should not be excluded from consideration as having a specific learning disability if their severe academic discrepancy is primarily the result of: (1) a visual, hearing, or motor handicap; (2) mental retardation; (3) emotional disturbance; or (4) environmental, cultural, or economic disadvantage.

Response. No change has been made. These exclusions are statutory.

Comment. Commenters asked for definitions of visual handicaps, motor handicaps, and other "exclusion" terms.

Response. The term "visually handicapped" and other handicapping conditions are defined in § 121a.5. Motor handicap is considered as being included in the definition of orthopedically impaired. Other terms will be applied on a case-by-case basis by professional team members.

THEORY OF THE PROCEDURAL APPROACH

Comment. Commenters requested information on the theoretical basis for the approach taken.

Response. Those with specific learning disabilities may demonstrate their handicap through a variety of symptoms such as hyperactivity, distractability, attention problems, concept association problems, etc. The end result of the effects of these symptoms is a severe discrepancy between achievement and ability. If there is no severe discrepancy between how much should have been learned and what has been learned, there would not be a disability in learning. However, other handicapping and sociological conditions may result in a discrepancy between ability and achievement. There are those for whom these conditions are the primary factors affecting achievement. In such cases, the severe discrepancy may be primarily the result of these factors and not of a severe learning problem. For the purpose of these regulations, when a severe discrepancy between ability and achievement exists which cannot be explained by the presence of other known factors that lead to such a discrepancy, the cause is believed to be a specific learning disability.

It was on this basic concept that these regulations were developed.

CERTIFICATION REQUIREMENTS

Comment. A few commenters questioned the need for certification by the team as to the existence of specific learning disabilities.

Response. No change has been made. By specifying the procedures to be used in determining the existence of a specific learning disability and because the team has all of the data on which to make an appropriate decision, heavy reliance was placed on the judgment of the evaluation team. Since the team has a great deal of latitude in making the determination of the existence of a specific learning disability, it was apparent that the team should document its decision and should clearly indicate the basis on which the determination was made.

SPECIFIC AREAS OF ACHIEVEMENT TO BE REVIEWED

Comment. A few commenters expressed concern that spelling not be listed as one of the eight areas of function which could be evaluated to establish a severe discrepancy between ability and achievement. It was stated that a severe discrepancy in spelling would not necessarily be indicative of a specific learning disability and that the component factors of spelling could be included under one or more of the other seven factors. Some of those commenters stated that when spelling was one of the factors to be evaluated the requirement should be that a severe discrepancy in two or more areas would have to be indicated.

Response. Though "spelling" is listed in the statute, the components of spelling can be assumed under the other seven areas of function. Spelling as a category per se has been deleted from the final regulations.

MAINTENANCE OF 2 PERCENT CAP ON COUNT

Comment. Some commenters indicated that (1) since specific learning disabilities are difficult to define based on current knowledge and (2) because of the need for extensive research to be conducted before a universally accepted definition can be created, the requirement in the Act that limits the number of children eligible to be counted as learning disabled for the purpose of generating the Part B entitlement should be extended. The suggestion was that the cap on counting these children for allocation purposes would remain until such time as it was possible to differentiate all of the specific learning disabilities.

Response. Under the statute, the cap is removed upon the effective date of these regulations. It is generally agreed by parents and professionals alike that the isolation of various labels used by different theorists, as cited in the legislative history, are overlapping and represent assumptions about conditions which cannot with current technology be successfully determined or discretely categorized. Other categories of handicapping conditions as defined have no cap. Since there may in fact be more than two percent of the school age population in some States that are handicapped by specific learning disabilities, such a limitation is inequitable. Such a procedure would not help provide a basis for the determination of whether a child has a specific learning disability, and would not provide assistance in helping to resolve questions of appropriate diagnosis or placement in the event of due process hearings. For these reasons, it is better to adopt the regulations and lift the cap.

NEED FOR ADDITIONAL RESEARCH

Comment. Several commenters pointed out the need for additional research in the area of specific learning disabilities.

Response. As stated in the preamble to the proposed regulations, this need is almost universally acknowledged. The Bureau of Education for the Handicapped and other HEW agencies will continue to support research on the nature and treatment of specific learning disabilities.

MEDICAL EVALUATION

Comment. A few commenters expressed concern that medical examinations were not mandated for every child suspected of having a specific learning disability.

Response. Medical services that are necessary for diagnostic purposes are covered by the definition of related services in § 121a.13.

MORE DETAIL

Comment. Commenters asked for more detail on some of the requirements, for example, a more extensive description of length of observation and specific behaviors to be observed.

Response. No change has been made. The Office of Education believes the evaluation procedures are already very extensive and should prevent mislabeling.

[FR Doc.77-36597 Filed 12-28-77;8:45 am]

federal register

MONDAY, OCTOBER 3, 1977

PART VI

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Office of Education

■

VOCATIONAL EDUCATION, STATE PROGRAMS AND COMMISSIONER'S DISCRETIONARY PROGRAMS

[4110–02]

Title 45—Public Welfare

CHAPTER I—OFFICE OF EDUCATION, DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

STATE ADMINISTERED PROGRAMS AND COMMISSIONER'S DISCRETIONARY PROGRAMS

AGENCY: Office of Education, HEW.

ACTION: Final regulations.

SUMMARY: These regulations implement the Vocational Education Act of 1963 as completely revised by the Education Amendments of 1976. The regulations cover both the State administered programs and the Commissioner's discretionary programs. Generally, the regulations are designed to assist States to improve planning in the use of all resources for vocational education and to overcome sex discrimination in vocational education. Also, the regulations permit consolidation of programs to provide greater flexibility to the States in conducting vocational education programs.

EFFECTIVE DATE: Pursuant to section 431(d) of the General Education Provisions Act, as amended (20 U.S.C. 1232 (d)), these regulations have been transmitted to the Congress concurrently with their publication in the FEDERAL REGISTER. That section provides that regulations subject thereto shall become effective on the forty-fifth day following the date of such transmission, subject to the provisions therein concerning Congressional action and adjournment.

FOR FURTHER INFORMATION CONTACT:

Ms. Juliette Lester, Chair of the Regulations Task Force, Bureau of Occupational and Adult Education, Room 5002, Regional Office Building No. 3, 7th and D Streets SW., Washington, D.C. 20202 (202–245–3465).

SUPPLEMENTARY INFORMATION:

RULEMAKING HISTORY

The Office of Education has been vitally concerned about the need for intensive public participation in the development of these regulations because of the substantial impact Pub. L. 94–482 will have on the administration and operation of vocational education programs throughout the nation. The major steps and activities involved in carrying out these public participation objectives are set forth below.

After the Act was passed the Commissioner published in the FEDERAL REGISTER (41 FR 49742) a Notice of Intent to Issue Regulations (NOI) on November 10, 1976. This NOI contained a comprehensive overview of the Act and set forth fifteen substantive issues needing clarification in the regulations. After publication of the NOI, a 65-day comment period followed, during which public comment was solicited. Between November 22, 1976 and January 15, 1977, public meetings were held in each State to discuss the issues raised in the NOI and any other relevant issues. Approximately 6,000 people attended these 66 meetings. Also, during this 65-day comment period, over 600 letters and telephone calls were received in response to the NOI from a wide variety of commenters. At the end of this initial comment period, all comments and suggestions received were analyzed and the proposed regulations were drafted to reflect this public participation.

The Notice of Proposed Rulemaking (NPRM) was published in the FEDERAL REGISTER at 42 FR 18542 on April 7, 1977. In addition to the proposed regulations, the NPRM also contained in the preamble an overview of the regulations. A 30-day comment period followed publication of the NPRM. A press release from the Office of Education was sent to approximately 450 local organizations and newspapers announcing the publication of the NPRM and the schedule for the public meetings. Public meetings were conducted in the ten HEW regional cities from April 20 through April 29. Letters of invitation were sent to approximately 10,000 individuals and organizations. Educators, administrators, consumers of the program, and members of the general public attended these meetings and presented formal statements. In addition, almost 700 letters were received containing comments, criticisms, recommendations, and questions on nearly every section of the proposed regulations. These comments came from diverse groups and individuals, including State and local educators and administrators, women's groups, and a large number of vocational students and teachers. This massive amount of public input was analyzed during the development of the final regulations. A summary of the comments received and the responses to these comments are set forth in this preamble.

Although the final regulations have been significantly affected by intense public involvement, the Office of Education sees the development of regulations implementing the Vocational Education Act as being an evolutionary process which will continue over a period of several years. The actual impact and consequences of the statutory provisions and problems which States and local educational agencies may have in implementing these provisions are not known at the present time. Therefore, the public is encouraged to continue to submit their views on these regulations, and the Office of Education will amend and revise the regulations in the future as need and experience dictate.

OVERVIEW OF THE REGULATIONS

PART 104—STATE ADMINISTERED PROGRAMS

STATE ADMINISTRATION

Any State which desires to receive funds under the Act must designate a State board to be the sole State agency responsible for the administration of programs under the Act (§ 104.31). This board may delegate any of its responsibilities (§ 104.33) except those listed in § 104.32 (a) to (d). The State must also assign full-time personnel to assist in reducing sex discrimination and sex stereotyping in vocational education programs and activities throughout the State (§ 104.72). Each State is to expend $50,000 from the basic grant for this purpose (§ 104.74).

Each State must establish a State advisory council representing at least 20 designated interests (§ 104.92). There must be an appropriate representation by sex, race, ethnicity, and geography on the council to effectively reflect the diverse interests and needs of the general public (§ 104.92(b)). The functions and responsibilities of the State advisory council are expanded to include identifying manpower as well as vocational needs, commenting on the reports of the State Manpower Services Council, and providing technical assistance to local advisory councils (§ 104.93). The expenditure of funds made available to the council is to be determined solely by the council for carrying out its functions (§ 104.96).

Each local educational agency (LEA) and postsecondary institution receiving Vocational Education Act (VEA) funds through the State board must establish a local advisory council composed of members of the general public to provide advice on job needs and relevancy of courses to those needs (§ 104.111).

Each State must also establish a State Occupational Information Coordinating Committee (SOICC) (§ 104.122). This SOICC must implement an occupational information system in the State which will meet the common needs for the planning for, and operation of, programs of the State board and of the administering agencies under the Comprehensive Employment and Training Act (§ 104.123).

PLANNING

To be eligible to receive funds, a State must maintain on file with the Commissioner a general application containing twelve assurances covering a broad range of administrative and fiscal matters (§ 104.141). This application includes the assurance that the State will give priority, in distributing funds, to (1) economically depressed areas and areas with high unemployment rates which are unable to meet the vocational needs of these areas without Federal assistance, and to (2) programs which are new to the areas to be served and which meet new and emerging manpower needs. The State must also use as the two most important factors in distributing funds to local educational agencies (1) the relative financial ability to provide needed services and (2) the relative concentration of low-income populations within such agencies. In the case of other eligible recipients, the State must use, as the two most important factors, the recipient's relative financial ability to provide needed services and the relative concentration of students it serves who impose

higher than average costs (e.g. handicapped, disadvantaged, those with limited English-speaking ability).

The State must submit to the Commissioner a five-year State plan by July 1, 1977 for fiscal years 1978 through 1982 and a second five-year State plan on July 1, 1982 for fiscal years 1983 through 1987 (§ 104.161).

In formulating the plan, the State board is to involve actively a representative of the State agencies for secondary education, postsecondary vocational education, community and junior colleges, and institutions of higher education. The State board must also involve representatives from local school boards, vocational teachers, local school administrators, the State Manpower Services Council, the State agency for Comprehensive Postsecondary Education Planning, and the State advisory council (§ 104.162). The State board and these designated representatives must meet at least four times during the planning year (§ 104.163). If these representatives are not able to agree on the contents of the State plan, the State board is responsible for reaching a final decision (§ 104.164). In this event, the State board must include in the plan the recommendations rejected by the State board and the reason for each rejection. Any dissatisfied agency may appeal the State board's decision to the Commissioner (§ 104.281). The Commissioner will then decide whether that State plan is supported by substantial evidence, as shown in the State plan, and will best carry out the purposes of the Act (§ 104.288).

The five-year State plan must contain the procedures for carrying out certain assurances of the general application (§ 104.182) and the specific program provisions described in § 104.183 through § 104.188. These provisions include an assessment of employment opportunities in the State (§ 104.183), the goals the State will seek to meet employment needs (§ 104.184), the planned funding to meet employment needs (§ 104.185), the intended uses of funds to meet specific program needs (§ 104.186), the policies adopted by the State to eradicate sex discrimination (§ 104.187), and a description of the mechanism established for coordination between manpower training programs and vocational education programs (§ 104.188).

The planning process also includes the submission of an annual program plan (§ 104.202) and annual accountability report (§ 104.203). The procedural requirements for developing the five-year plan are also applicable to the annual plan and accountability report but the number of required planning meetings is reduced to three (§ 104.205).

Even though the annual plan is essentially an updating of the five-year plan, it must contain the proposed distribution of funds among eligible recipients. The additional requirements of the annual plan are described in §§ 104.221 and 104.222. The content of the annual accountability report is described in § 104.241.

FISCAL REQUIREMENTS

Federal VEA funds must be used to share only in expenditures which are made in accordance with the assurances of the general application, five-year State plan and annual program plan (§ 104.301). The Federal share of expenditures under the five-year State plan and annual program plan may not exceed 50 percent of the cost of carrying out the programs (§ 104.302).

The fiscal requirements for allowable expenditures for the national priority programs are described in § 104.304. At least 10 percent of the State's allotment under section 102(a) of the Act is to be used to pay up to 50 percent of the costs of special programs, services, and activities for the handicapped (§ 104.312); at least 20 percent of the State's allotment under section 102(a) of the Act is to be used to pay up to 50 percent of the costs of special programs, services, and activities for the disadvantaged, for persons with limited English-speaking ability and for stipends for students with acute economic needs which cannot be met under other programs (§ 104.313); and at least 15 percent to pay up to 50 percent of the cost of postsecondary and adult programs, services, and activities (§ 104.314). The percentage of the 20 percent set-aside which goes to persons with limited English-speaking ability is equivalent to the proportion such persons age 15–24 are to the entire population of the State in the same age bracket (§ 104.313).

The Federal share for State administration of the five-year State plan and annual program plan, from funds allotted to the State under section 102(a) of the Act, is up to 50 percent of the cost of administration of the plans (§ 104.306). The Federal share in fiscal year 1978 is up to 80 percent and in fiscal year 1979 the Federal share is up to 60 percent. The Federal share for the cost of local supervision and administration from funds available under section 102 (a) must be computed in accordance with either of the two methods set forth in § 104.307.

STATE EVALUATION

Each State must evaluate the effectiveness of each funded program within a five-year period (§ 104.402). These evaluations must be in terms of the planning and operational processes, results of student achievement, results of student employment success and results of additional services that the State provides under the Act of special populations (§104.402). Programs which purport to impart entry level job skills are to be evaluated according to the extent to which program completers and leavers find employment in related occupations and are considered well-trained by their employers (§ 104.404).

BASIC GRANT

Each State shall use its basic grant, which is 80 percent of the funds allotted under section 102(a) of the Act, for the purposes described in § 104.502. These purposes include vocational education programs, work-study programs, cooperative vocational progams, energy education programs, construction of area vocational education facilities, support of full-time personnel to eliminate sex bias, stipends for students who have acute economic needs which cannot be met by other programs, placement services for students whose needs cannot be met by other programs, industrial arts programs, support services for women who enter programs designed to prepare individuals for programs traditionally limited to men, day care services for children of persons enrolled in vocational schools, construction and operation of residential vocational schools, provision of vocational training through arrangements with private vocational training institutions and State and local administration. The scope and specific program requirements of each purpose are set forth in §§ 104.511 through 104.634. This extensive list of programs, activities, and services has been consolidated into a single basic grant to allow the States to determine their own priorities for funding.

PROGRAM IMPROVEMENT AND SUPPORTIVE SERVICES

The State must use 20 percent of its allotment under section 102(a) of the Act for Subpart 3—program improvement and supportive services (§ 104.701). Under program improvement and supportive services, funds may be used for research programs (§ 104.705), exemplary and innovative programs (§ 104.706), and curriculum development programs (§ 104.708). These programs are to be operated by research coordinating units (RCU) or are to be conducted by contracts awarded by the RCU (§ 104.703). The State must develop a comprehensive plan of program improvement which includes the intended uses of funds and a description of the State's priorities. The pertinent contract requirements for research programs and for curriculum programs are described in § 104.704. Exemplary and innovative programs must give priority to reducing sex bias and sex stereotyping in vocational education (§ 104.706).

Not less than 20 percent of the funds reserved for program improvement and supportive services are to be used for guidance and counseling services which may include initiation and improvement of counseling services, counseling leading to greater understanding of educational and vocational options, provision of placement and follow-up services for vocational students and individuals preparing for occupations requiring a baccalaureate or higher degree, training to help overcome sex-biased counseling, counseling in correctional institutions, counseling for persons of limited English-speaking ability, resource centers for out-of-school individuals, and leadership for guidance and counseling personnel (§ 104.763).

The State may also use part of the funds reserved for program improvement and supportive services for vocational education personnel training (§ 104.771). Training may be provided to

persons serving or preparing to serve in vocational education programs, including teachers, administrators, supervisors, and vocational guidance and counseling personnel (§ 104.773).

Funds under program improvement and supportive services may also be used for grants to overcome sex bias and sex stereotyping (§ 104.791). The purpose of these grants is to support activities which show promise of overcoming sex bias and sex stereotyping in vocational education and may be in the areas of research, curriculum development, or guidance and counseling (§ 104.793).

The State may also use part of the funds reserved for program improvement and support services for State and local administration (§§ 104.306 and 104.307).

SPECIAL PROGRAMS FOR THE DISADVANTAGED

Each State must use the funds allotted to it from the authorization under section 102(b) of the Act for special programs of vocational education for disadvantaged persons in areas of high youth unemployment or school dropouts (§ 104.802). The criteria of need and eligibility for disadvantaged persons are described in § 104.804. These projects for the disadvantaged may receive up to 100 percent Federal support (§ 104.802).

CONSUMER AND HOMEMAKING

The State must also use the funds allotted to it from the authorization under section 102(c) of the Act for programs of consumer and homemaking education (§ 104.901). The Federal share is 50 percent except in economically depressed areas where the Federal share is 90 percent (§ 104.906). One-third of the separate authorization is for economically depressed areas. Grants may be used for (1) educational programs that encourage males and females to prepare for combining homemaking and wage earning roles, develop curriculum materials which encourage elimination of sex stereotyping, give greater consideration to needs in economically depressed areas, encourage outreach programs, prepare persons for the homemaker role, emphasize consumer, nutrition, and parenthood education (§ 104.904) and (2) for ancillary services (§ 104.905).

An appendix containing definitions is added at the end of Part 105.

PART 105—COMMISSIONER'S DISCRETIONARY PROGRAMS

PROGRAM IMPROVEMENT

Under this subpart the Commissioner is authorized to support projects of national significance for improvement of vocational education primarily through contracts and, in some cases, through grants (§ 105.101). The Commissioner may fund up to 100 percent of the cost of the following types of activities if they are found to be of national significance: (a) Research projects; (b) exemplary and innovative projects; (c) vocational curriculum development projects; (d) vocational guidance and counseling programs; (e) vocational education personnel training programs; and (f) grants to assist in overcoming sex bias and sex stereotyping (§ 105.104).

A grant applicant must be able to demonstrate a reasonable probability that the project will result in improved teaching techniques or curriculum materials that will be used in a substantial number of classrooms or other learning situations within five years after the termination date. Exemplary and innovative projects must provide for appropriate participation by nonprofit private school children (§ 105.109). Activities funded shall include contracts to convert job preparation curriculums prepared for use by the armed services to curriculums usable by the schools (§ 105.103).

CONTRACT PROGRAM FOR INDIAN TRIBES

The Commissioner will enter into contracts with Indian tribal organizations at the request of Indian tribes to plan, conduct, and administer programs which are consistent with the Act and regulations (§ 105.201). The sections of the Indian Self-Determination and Education Assistance Act of 1975 which are applicable are set forth in § 105.202. The criteria for the selection of award recipients are in § 105.211. Additional factors for declining to enter into a contract are listed in § 105.212.

TRAINING AND DEVELOPMENT PROGRAMS FOR VOCATIONAL EDUCATION PROGRAMS FOR VOCATIONAL EDUCATION PERSONNEL

The Commissioner is to provide opportunities for full-time advanced study of vocational education, opportunities for certified teachers in other fields to become vocational education teachers, and opportunities for persons in industry with skills in fields for which there is a need for vocational educators to be so trained (§§ 105.302 and 105.431). Persons having two years of experience in vocational education or in comparable types of situations and who have a baccalaureate degree may receive awards for use at the graduate level, in approved institutions of higher education (§ 105.304). Persons certified to teach in any field who have applicable vocational skills or persons employed in industry with similar skills may receive awards for use in approved teacher-training institutions (§ 105.311). The criteria for approving applications for leadership development awards are in § 105.309. The criteria for approving applications for certification fellowships are in § 105.443.

EMERGENCY ASSISTANCE FOR REMODELING AND RENOVATING OF VOCATIONAL EDUCATION FACILITIES

The Commissioner will make grants to urban and rural local educational agencies which are unable to provide vocational programs to meet existing manpower needs because of the obsolescence of their facilities or equipment (§ 105.501). Grants may be used to support 75 percent of the cost of modernizing such facilities (100 percent in cases of extreme need) and the cost of changes necessary to comply with the Architectural Barriers Act (§ 105.506). The criteria for approving applications are set forth in § 105.505.

BILINGUAL VOCATIONAL TRAINING

The Commissioner will make grants to support bilingual vocational training programs (§ 105.601), bilingual vocational instructor training programs (§ 105.611), and programs for the development of bilingual instructional materials (§ 105.621). The criteria to be used in reviewing applications for these three programs are set forth in §§ 105.606, 105.616, and 105.626 respectively.

TECHNICAL AMENDMENTS

On June 3, 1977, Pub. L. 95-40 was signed into law by the President. This Act makes several technical and miscellaneous amendments to provisions relating to vocational education contained in Title II of the Education Amendments of 1976, Pub. L. 94-482. As a result of the enactment of these Technical Amendments, certain revisions have been made to these final regulations.

In accordance with section 431(b)(2)(A) of the General Education Provisions Act it is the practice of the Office of Education to provide an opportunity for interested parties to take part in its rulemaking process. However, a separate rulemaking procedure on these revisions to the regulations is unnecessary because these revisions to the regulations conform to the language of the Technical Amendments.

Furthermore, a separate rulemaking procedure on the revisions to the regulations would be contrary to the public interest because it would prolong the effective date of the regulations and cause undue delay in the implementation of the vocational education State-administered program. Since the five year State plan and annual program plan are to be effective as of October 1, 1977, it is necessary to have the publication of final regulations at this time.

The amendments contained in Pub. L. 95-40, other than those merely typographical, are briefly summarized in the following paragraphs. (The numbered paragraphs do not correspond to the sequential order of the Technical Amendments.) In each instance in which a conforming change is made in the regulation, a citation to the regulation is given.

1. Use of Federal funds for State administration is deleted from the authorization of section 102(d) and is made an allowable use of funds under the authorization of section 102(a). This amendment has the effect of removing the $25 million limitation on use of Federal funds for State administration which was contained in section 102(d). Instead, the State now has the flexibility to use whatever amount of Federal funds is necessary for prudent State administration of vocational programs. Federal funds used for State administration, however, must be expended in accordance with the State plan and the matching requirements of section 111(a)(2). In addition, Federal funds used for State administration must be prorated between the amount available for basic grants in subpart 2 (80 percent) and program improvement and support services in sub-

part 3 (20 percent). Although this division will prevent administrative expenses from being disproportionately charged against a single program activity, it is not required that administrative personnel be distributed in an 80/20 ratio between subpart 2 and subpart 3 activities. Rather, the State may distribute its administrative personnel in whatever proportion best meets its needs. Section 104.306 of the NPRM is rewritten to conform to these changes in the Act.

(2) Pub. L. 95-40 permits local administrative and supervisory costs to be paid out of the State's allotment under section 102(a). Federal funds used for local administration must also be prorated between subpart 2 (80 percent) and subpart 3 (20 percent).

Section 111(a)(1)(C)sets forth two methods for computing the Federal share. In the first case, the percentage of Federal funds used by an eligible recipient for the costs of supervision and administration of vocational education programs may be no greater than the percentage of Federal funds used to support the total vocational education program carried out by the eligible recipient. For example, the total cost of the vocational education program of the eligible recipient is $100,000 and the Federal contribution to this eligible recipient is $25,000 or 25 percent of the total. If local administrative costs are $10,000, then up to 25 percent of this amount or $2,500 may be charged against the Federal funds.

The second method allows up to 50 percent of the costs of supervision and administration to be charged to Federal funds provided that State funds match Federal funds dollar for dollar. State funds used to match Federal funds must be specifically made available for the purpose of local administration. For example, if the total cost of local administration is $10,000, then up to $5,000 may be charged to Federal funds as long as the State contributes the same amount from a specific State appropriation.

Both methods for computing local administrative costs are contained in a new regulation, § 104.307.

(3) Section 110 of the Act is amended to allow for the cost of all programs, services, and activities listed in subpart 2 (section 120) and subpart 3 (section 130) to be applied against the minimum percentages for the national priority programs (i.e. handicapped, disadvantaged, and postsecondary). Previously, the cost of vocational education programs as defined in section 195 was the only allowable use of funds to meet the section 110 minimum percentage requirement. In addition, the amendments remove an ambiguity in the Act by applying the three minimum percentages for the national priority programs directly against the section 102(a) authorization. Sections 104.303 and 104.304 are revised to conform to these statutory changes.

(4) Section 120 of the Act is amended to authorize the use of Federal funds for vocational training through private vocational training institutions. Arrangements may be made with these institutions if they can make a significant contribution to attaining the objectives of the State plan, and can provide substantially equivalent training at a lesser cost, or can provide equipment or services not available in public institutions. The definition of "private vocational training institutions" is added to section 195 of the Act. Sections 104.502 and 104.514 are amended accordingly. The new definition is added to Appendix A to these regulations.

(5) Sections 132 and 133 of the Act are amended to clarify that the State's research coordinating unit shall be responsible for coordinating exemplary and innovative programs (section 132) and curriculum programs (section 133) as well as research programs in section 131.

(6) Substantive changes are made to the section 103(a)(1)(B) responsibilities for the Bureau of Indian Affairs (BIA). First, the amendments require BIA, beginning in fiscal year 1979, to expend an amount which is equal to the amount available to the Commissioner for the Indian contract program for vocational education programs, services, and activities. BIA must expend not less than the amount expended during the prior year on these programs. In addition, the Commissioner of Education and the Commissioner of Indian Affairs will jointly prepare a plan for the expenditure of the funds and for the evaluation of programs assisted under this part. The Commissioner (OE) will assume responsibility for the administration of the program with the assistance and consultation of the Bureau of Indian Affairs. BIA is no longer deemed a State board. Accordingly, the reference in § 105.214 in the NPRM to BIA being deemed a State board is deleted.

(7) The Technical Amendments amend the eligibility provision for Indian tribes to participate in the contract program. Section 103(a)(1)(B) extends the authority of the Commissioner to contract for vocational programs with any Indian tribe which is eligible to contract for administration of programs under the Indian Self-Determination Act, rather than just those tribes which have actually contracted under that Act. The corresponding change is made to § 105.205.

(8) The Amendments include the Northern Mariana Islands as a State for the purpose of the Vocational Education Act and also include the Northern Mariana Islands with the other outlying areas for determination of allotment ratios under the Act.

(9) Section 105(d)(4)(A) is amended to require State advisory councils on vocational education to assess the extent to which special education programs as well as vocational education and manpower programs are meeting the needs of the State. Section 104.93(f) of the regulations is amended to reflect this additional responsibility in relation to special education.

(10) Section 105(f)(1) is amended to require that appropriations for the State advisory councils are to be allocated under the allotment method contained in section 103(a)(2).

(11) The Technical Amendments correct an error in section 111(a)(1)(C) which contains the authority for 100 percent Federal funding. Former references to sections 122(f), 133(b) and 140 are deleted and references to sections 122(f), 132(b) and 140(b)(2) are inserted. The result is that cooperative vocational education programs, exemplary programs, and special programs for the disadvantaged, when they include students from nonprofit private schools, may be supported with up to 100 percent Federal funding. Section 104.305 of the regulations conforms to these amendments.

(12) Section 111(a) of the Act is amended by adding a new subparagraph (3) to clarify the Commissioner's authority to pay, from the amount available to each State under the section 102(d) allotment, an amount up to 100 percent of the cost of planning and evaluation activities authorized under section 102(d).

(13) The section 111(a)(2)(B) provision which allows the Federal share of State administration in fiscal year 1978 to be in excess of 80 percent if the State has over matched the Federal funds by ten to one is amended. The determination year is changed from fiscal year 1977 to the latest fiscal year for which reliable data are available. Section 104.306(c) of the regulations conforms to this amendment.

(14) The noncommingling requirement in the cooperative vocational education program (section 122(g)) is amended in order to clarify that the noncommingling requirement applies only to those funds used for programs involving students in nonprofit private schools. Subsection (e) of the new § 104.533 prohibits the commingling of Federal, State, and local funds for programs which include students enrolled in nonprofit private schools.

(15) The clerical error in the language of section 134(a) concerning the use of funds for the eight guidance and counseling activities is corrected. Whereas the provision previously appeared to require section 134 funds to be used for all eight activities, the correction makes it clear that funding shall be for one or more of these activities.

(16) Section 161(a)(3)(A) is amended by delaying for one year the date the national vocational education data reporting and accounting system is to be in full operation.

(17) The implementation date for the occupational information data system in section 161(b)(1) is delayed for one year to September 30, 1978.

(18) Two changes are made to the section 162 authority governing the National Advisory Council on Vocational Education. First, this section restores the authority to the Council to accept gifts if the acceptance of such gifts will better enable the Council to carry out its func-

tions. Secondly, the section makes clear that the Council is to review special education programs as well as vocational education and manpower programs.

(19) The statutory definition of "handicapped" is amended to conform the definition to that used in the Education of the Handicapped Act. Persons with specific learning disabilities are now included under the definition. Also, the term "orthopedically impaired" is substituted for the term "crippled." Corresponding changes are made to the definition of "handicapped" in Appendix A of the regulations.

(20) Pub. L. 95-40 also amends section 107(b)(4) of the Comprehensive Employment and Training Act of 1973 (CETA). The amendment requires the National Commission on Manpower Policy and the State Manpower Services Councils to review the extent to which special education programs as well as vocational education and manpower programs represent a coordinated approach to the employment and training and vocational education needs of the nation.

(21) Finally, Pub. L. 95-40 makes certain amendments to section 523 of the Education Amendments of 1976. The amendments delay for one year the final submission of the reports by the National Institute of Education and makes the report on consumer and homemaking education submittable on the same date as the report on the regular vocational education program. Also, beginning in fiscal year 1978 the full sum of the reservation of funds in this section will be made available to the National Institute of Education for its studies.

CRITICAL ISSUES

Many comments were submitted on many sections of the proposed regulations. These comments and the responses are set forth following the text of the regulations. Some of the comments raised critical policy issues with respect to the interpretation and implementation of the Act. The critical issues are briefly summarized in the following paragraphs.

1. FUNDING FORMULA FOR THE LIMITED ENGLISH-SPEAKING ABILITY POPULATION

Section 110(b)(2) of the Act requires each State to compute the amount of funds for persons with limited English-speaking ability from the "funds used by a State pursuant to section 110(b)(1)." Section 110(b)(1) directs the State to use at least 20 percent of the allotment under section 102(a) for the cost of vocational education for disadvantaged persons, for persons of limited English-speaking ability and for stipends.

The interpretation contained in the NPRM was for the State to apply the percentage of persons of limited English-speaking ability to the amount of the set-aside. For example, if the limited English-speaking population of the State is 10 percent, then 10 percent of the 20-percent set-aside (2 percent of the section 102(a) allotment) would be earmarked for persons of limited English-speaking ability.

Another legally supportable interpretation which would result in a significant change in the method by which Federal funds are distributed by the States to disadvantaged persons was given serious consideration by the Commissioner during the comment period. Under this interpretation, the State would apply the percentage of persons of limited English-speaking ability to the entire allotment under section 102(a), but such amount could not exceed the total amount reserved for the section 110(b)(1) set-aside. In accordance with this interpretation, if the limited English-speaking population of the State is 10 percent, then 10 percent of the entire allotment (rather than 10 percent of the set-aside) would be earmarked for the limited English-speaking population.

Since the Act is susceptible of two interpretations, the Commissioner has decided to retain the interpretation contained in the NPRM, set forth in § 104.313(c). The Commissioner believes that the adoption of the latter interpretation would place drastic limitations on funds available for other disadvantaged students' needs and would substantially undermine many on-going vocational education programs for disadvantaged persons.

2. EXCESS COSTS OF VOCATIONAL EDUCATION PROGRAMS FOR HANDICAPPED AND DISADVANTAGED PERSONS

Section 110(a) of the Act requires each State to expend at least 10 percent of its allotment under section 102(a) for the "cost of vocational education for handicapped persons." Section 110(b) requires at least 20 percent of the allotment under section 102(a) to be expended for the "cost of vocational education for disadvantaged persons * * *."

The statutory language "cost of vocational education," in sections 110(a) and 110(b) was interpreted in the NPRM to mean "full cost." It was stated in the preamble at 42 FR 18549 that, as long as the State complies with the matching requirements in section 110 of the Act, the State could use the combined Federal, State, and local funds to pay the entire cost of the vocational education program for handicapped and disadvantaged persons. In other words, Federal funds for vocational education programs for handicapped and disadvantaged persons were not limited solely to the cost of special services needed by the handicapped and disadvantaged.

Many commenters believed that the interpretation contained in the NPRM was a serious misreading of Congressional intent. According to these commenters, unless the Federal and matching State and local funds were used to pay the excess costs of necessary program modifications, supplementary services or special programs for handicapped and disadvantaged persons, funds available to accommodate these special populations would be greatly reduced. These commenters suggested that the statutory language "cost of vocational education" must be read in the context of the definitions of "handicapped" and disadvantaged" which emphasize the special services which are needed to enable handicapped and disadvantaged persons to take full advantage of the vocational education program.

The Commissioner agrees that paragraphs (a) and (b) of section 110 are susceptible of the interpretation proffered by these commenters. Since a reduction in services for handicapped and disadvantaged persons might result by charging the full cost of the vocational education program against the required minimum, the comments in support of charging the excess costs are accepted. Accordingly, § 104.303 of the regulations is amended to require the Federal and matching State and local funds to be used to pay only the "excess costs" (that is, the costs of special education and related services above the costs of the regular students) of the programs for the handicapped and disadvantaged. For example, if the cost of providing vocational training to the non-handicapped student is $600, and the cost of providing vocational training to the handicapped student in the same class is $750, the State may use the combined Federal, State, and local funds to pay only the incremental cost of $150 for the vocational education program for the handicapped student.

Alternatively, if the handicapped or disadvantaged student is placed in a separate program, Federal, State and local funds may only be used to pay those costs which exceed the average per pupil cost for vocational education for non-handicapped or non-disadvantaged students.

3. PROVIDING DATA BY "PROGRAMS" RATHER THAN "COURSES"

Section 104.184(a) of the NPRM contained a requirement that the five-year State plan describe the State's goals in terms of the "programs (courses) and other training opportunities to be offered to meet employment needs." "Program" is defined as a "planned sequence of courses, services, or activities designed to meet an occupational obective." Since the Act uses the term "courses," there has been considerable debate during the development of the regulations over which term, "program," or "course" carries the proper interpretation in line with Congressional intent.

The major difficulty in changing from "programs" to "courses" in the final regulations is that it would create an undue reporting burden on the States and would greatly increase paperwork. Another problem is that "course" has no standard definition throughout the States, while "program" is specifically defined by the Office of Education in Handbook VI, entitled "Standard Terminology for Curriculum and Instruction in Local and State School Systems" (1970), which currently provides for reporting on at least 160 designated programs. Educators are familiar with OE's list of "instructional programs." The definitions are used by all States. Data by "courses" would be very difficult to obtain since all reporting presently is in

terms of "programs." Definitions of "courses" vary from State to State and within a particular State. Since "course" is not a standardized term, aggregation of data would be virtually impossible.

In view of these difficulties, reporting data by programs rather than by courses should provide sufficient detail in the five-year State plan to meet the intent of the law adequately. Accordingly, the text of the final regulation has not been changed.

4. DEFINITIONS OF "ADULT PROGRAM" AND "POSTSECONDARY PROGRAM"

A great many comments were received in relation to the definitions of "adult program" and "postsecondary program" as they appeared in the Appendix to Part 104 in the Notice of Proposed Rulemaking. These comments objected to the definitions on three grounds:

(1) The definitions are not contained in the Act;

(2) They would jeopardize the student's eligibility for a Basic Educational Opportunity Grant (BEOG) or a College Work Study (CWS) grant; and

(3) They would "eliminate" post-high school programs in vocational and technical schools.

While it is true that the definitions, labeled as such, are not in the new Act, the language of the two definitions as set forth in Appendix A is taken directly from section 110(c) of the Act, which requires the State to set aside 15 percent of its basic grant for persons in two categories of programs. While these two categories of persons are not labeled in section 110(c) as "adult" or "postsecondary," they are so labeled in the legislative history of the Act (H. Rept. No. 94–1085, pp. 48–49) which indicates strong Congressional intent that the definitions be used to avoid the "enormous confusion" which has existed in reporting adult and postsecondary programs and that "a majority of the States urged Congress to clarify thse definitions."

Further study has indicated clearly that the definitions of "adult program" and "postsecondary program" will not affect a student's eligibility for a BEOG or CWS grant. Eligibility for grants under those programs is dependent on the Act and regulations for the particular program; they are not affected by definitions in the new Vocational Education Act or the regulations under the Act.

The definitions are intended, as the legislative history makes clear, for reporting (in the annual program plan and accountability report) and not for allocation purposes. Section 110(c) of the new Act, which uses the definitions, requires a set-aside of 15 percent for both categories; it does not require any specific apportionment between the two categories. Since a State may apportion its 15 percent set-aside between adult and postsecondary programs according to its decision as set forth in its State plan, the definitions as used in the Appendix to Part 104 will not "eliminate" any program at the post-high school level in a vocational and technical school. Nor should the definition in any way encourage States to favor post-high school level programs in community or junior colleges (which lead to an associate or other degree) over those in vocational and technical schools (which lead to a certificate). While some commenters suggested that post-high school programs leading to a certificate should be added to the definition of "postsecondary program," the legislative history is clear (H. Rept. No. 94–1085, bottom of page 48 and top of page 49), that such programs are to be considered for reporting purposes as adult programs.

5. EQUAL ACCESS FOR MINORITIES AND WOMEN

With respect to the policies and procedures that assure equal access for minorities and women, the question was posed whether the Office of Education will require more than a simple "we will not discriminate" statement in the five-year State plan.

Section 107(b)(4)(A) of the Act and § 104.187(a) of the regulations require the State to set forth a detailed description of the policies and procedures to assure equal access to programs by women and men. This description must include the specific actions taken to overcome sex discrimination and the incentives adopted to encourage enrollment of both women and men in nontraditional courses. A perfunctory statement in the five-year State plan that "we will not discriminate" will not satisfy this requirement in the Act and regulations.

The issue of equal access for minorities is not specifically addressed in the Vocational Education Act. Federal financial assistance under the Act, however, is subject to the regulations in 45 CFR Part 80 which effectuate the provisions of Title VI of the Civil Rights Act of 1964. These civil rights requirements are referenced in 45 CFR 100b.252 of the General Education Provisions Regulations and have a direct application to the vocational education regulations. In this connection, it is expected that the Office of Civil Rights will review the five-year plan and annual program plan for civil rights compliance, particularly in the program areas serving women, minorities, and the handicapped.

EXPLANATION OF THE DOCUMENT

SELF-CONTAINED DOCUMENT

The regulations are designed as a self-contained document, making it unnecessary to refer constantly to the Act. Accordingly, the regulations repeat all essential requirements of the Act so that the States, local educational agencies, and other eligible recipients under the State administered program (45 CFR Part 104) and all eligible applicants under the Commissioner's discretionary programs (45 CFR Part 105) may, in general, rely on the regulations without reference to the Act.

Reference to the General Education Provisions Act (GEPA) and the General Education Provisions Regulations (GEPR) will, however, be necessary. In particular, the civil rights requirements referenced in the General Education Provisions Regulations (45 CFR 100a.262 and 45 CFR 100b.262) have a direct application to Part 104 and Part 105. In addition, Federal financial assistance under the Vocational Education Act is subject to the regulations in 45 CFR Part 80 (which effectuate the provisions of Title VI of the Civil Rights Act of 1964), the regulation in 45 CFR Part 84 (which effectuate Section 504 of the Rehabilitation Act of 1973), and to the regulations in 45 CFR Part 86 (which effectuate the provisions of Title IX). Title IX provides that no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. To repeat these civil rights requirements, as well as the requirements of the General Education Provisions Regulations, in Part 104 and Part 105 would defeat the express purpose of the General Education Provisions Regulations, which is to publish in one place regulations which affect the various education programs generally.

TERMINOLOGY

To make reading and understanding of the regulations easier, the new Vocational Education Act is referred to simply as "the Act." Sections of the Act are referred to in the text, for example, as "section 101 of the Act." A section of the regulations is referred to, for example, as "§ 104.101" with use of the section symbol (§). The phrase "of these regulations" is not repeated. Thus a reference to "section 101" should be recognized as a reference to section 101 of the Act; a reference to "§ 104.101" is a reference to § 104.101 of the regulations.

To make the regulations more readable (and at the same time shorter) Acts or regulations which are frequently mentioned are referred to by their acronyms, "CETA," "GEPA," "GEPR," for example. The Department of Health, Education, and Welfare is "HEW." If an acronym is used, it is defined in the definitions or the text.

CITATION TO LEGAL AUTHORITY

As required by section 431(a) of the General Education Provisions Act (20 U.S.C. 1232(a)), a citation to the statutory or other legal authority for each provision of the regulations has been placed in parentheses on the line immediately following the text of the regulation. Each citation applies to the text of the regulations between that citation and the next preceding citation.

Citation is to the Vocational Education Act of 1963, as amended by Title II of the Education Amendments of 1976 (Pub. L. 94–482), as further amended by Pub. L. 95–40, unless otherwise noted. Citation to another act refers to the other act by name or other designation. For example, "section 434 of GEPA" is a citation to section 434 of the General Education Provisions Act. Citation to the United States Code, for example "(20 U.S.C. 2301)," generally follows a citation to a section of the Act.

It is important to note that a citation standing alone means that the regulation closely follows the section of the Act cited, with only minor editorial simplification. Where language is added in the regulation in order to interpret the Act, the citation reads "(Interprets Sec. ____)." Where the regulation implements the Act, such as when criteria are set forth, the citation reads "(Implements Sec. ____)."

INTERNAL FEDERAL MATTERS NOT REGULATED

The requirements of the Act relating to matters of internal Federal administration are not set forth in the regulations. For example, these regulations do not repeat the statutory requirement that the President appoint members of the National Advisory Council on Vocational Education (section 162 of the Act). Likewise, the regulations do not address the following: (a) The establishment and duties of the Bureau of Occupational and Adult Education (section 160 of the Act); (b) the requirement that the Commissioner make findings and suggestions in relation to State plans (section 112(a)(1) of the Act); (c) the requirement that the Bureau of Occupational and Adult Education (BOAE) review and analyze the programs in at least 10 States a year (section 112(a)(2) of the Act); (d) the requirement that the HEW Audit Agency conduct fiscal audits within the same States in which BOAE conducts its reviews (section 112(a)(2) of the Act); (e) the requirement that the Commissioner file an annual report with Congress (section 112(c) of the Act); and (f) the duties of the National Occupational Information Coordinating Committee (section 161(b) of the Act).

To conclude, in general terms, matters of internal Federal administration appearing in the Act under "Federal and State Evaluation" (section 112 of the Act) and "Federal Administration" (sections 160–162 of the Act) are not set forth in the regulations.

The Act provides for appeal to the United States Court of Appeals in several instances, including an appeal from the Commissioner's findings of noncompliance with the State plan (section 109(d)). Since an appeal to the courts is a legal matter to be handled by attorneys, the procedures for appeal set forth in the Act are not repeated in the regulations.

The Commissioner's delegations of authority are not set forth in the regulations. Hence, when the regulations say "the Commissioner" will perform a function, the Commissioner's authority to perform this function may have been delegated to another official in the Office of Education.

Appendix A, containing definitions of terms, is set forth following the text of the regulations for Parts 104 and 105. Appendix B contains questions and answers raised by interested persons with respect to the implementation of the Act. These questions raised important policy considerations and have legal significance. Following Appendix B, the comments, suggestions, and recommendations received during the rulemaking period and the responses to these comments are set forth as supplementary information.

NOTE.—The Office of Education has determined that this document does not contain a major proposal requiring preparation of an Inflation Impact Statement under Executive Order 11821 and OMB Circular A-107.

Dated: August 18, 1977.

JOHN ELLIS,
Acting Commissioner of Education.

Approved: September 26, 1977.

JOSEPH A. CALIFANO, Jr.,
Secretary of Health, Education, and Welfare.

(Catalog of Federal Domestic Assistance Program Nos. 13.493 Vocational Education—Basic Grants; 13.494 Consumer and Homemaking; 13.495 Program Improvement and Supportive Services; 13.498 Program Improvement Projects; 13.499 Special Needs; 13.500 State Advisory Councils; 13.503 Training and Development Awards for Vocational Education Personnel—Leadership Development Awards; 13.558 Bilingual Vocational Training; 13.586 Bilingual Vocational Instructor Training; 13.587 Bilingual Vocational Instructional Materials, Methods, and Techniques; 13.588 Vocational Education Contract Program for Indian Tribes and Indian Organizations; (to be assigned), Training and Development Awards for Vocational Education Personnel—Vocational Education Certification Fellowships.)

PART 100a—DIRECT PROJECT GRANT AND CONTRACT PROGRAMS

1. In part 100a, § 100a.10(a)(11) and § 100a.10(a)(26) (relating to programs under the Education Professions Development Act) are amended to read as following:

§ 100a.10 Scope.

(a) • • •

(11) Programs of contracts with Indian tribal organizations under section 103(A)(1)(B), programs of national significance under sections 171 and 172 of subpart 2 of Part B; programs of bilingual vocational training under sections 181–189B of subpart 3 of Part B; and programs of emergency assistance for remodeling and renovation of vocational education facilities under sections 191–194 of Subpart 4 of Part B, of Title I of the Vocational Education Act of 1963, as amended by section 202 of Pub. L. 94-482 (20 U.S.C. 2303(a)(1)(B), 2401, 2402; 2411–242 ; 2411–2444).

• • • • •

(26) Teacher Corps and Teacher Training Programs under Title V of the Higher Education Act of 1965, as amended by sections 151–153 of Pub. L. 94-482 (20 U.S.C. 1102–1104, 1119–1119a–1).

• • • • •

PART 100b—STATE ADMINISTERED PROGRAMS

2. In Part 100b, § 100b.10(f) is amended to read as follows:

§ 100b.10 Scope.

• • • • •

(f) State vocational education programs under sections 101–150 of Part A of Title I of the Vocational Education Act of 1963, as amended (20 U.S.C. 2301–2380).

PART 100c—INDIRECT COSTS UNDER CERTAIN PROGRAMS

3. In Part 100c, § 100c.1(f) is amended to read as follows:

§ 100c.1 Scope.

• • • • •

(f) State vocational education programs under sections 101–150 of Part A of Title I of the Vocational Education Act of 1963, as amended (20 U.S.C. 2301–2380).

• • • • •

4. New Parts 104 and 105 are added to read as follows:

PART 104—STATE VOCATIONAL EDUCATION PROGRAMS

Subpart 1—State Administration

Sec.

104.1 Scope.
104.2 Purpose.
104.3 Applicability of General Education Provisions Regulations.
104.4 Cross reference to definitions.
104.5 Requirements under Part B of the Education of the Handicapped Act.

STATE BOARD

104.31 Establishment of State board.
104.32 Responsibilities of the State board.
104.33 Delegation of functions.
104.34 State administration and leadership.

FULL-TIME PERSONNEL AND FUNCTIONS TO ELIMINATE SEX DISCRIMINATION AND SEX STEREOTYPING

104.71 Scope.
104.72 Selection of full-time personnel to eliminate sex discrimination and sex stereotyping.
104.73 Definitions.
104.74 Funds for full-time personnel and functions.
104.75 Functions of full-time personnel.
104.76 Studies to carry out functions.

STATE ADVISORY COUNCIL

104.91 Establishment and certification.
104.92 Membership.
104.93 Functions and responsibilities.
104.94 Meetings and rules.
104.95 Staff and services.
104.96 Fiscal control.
104.97 Annual evaluation report.

LOCAL ADVISORY COUNCILS

104.111 Establishment of local advisory councils.
104.112 Duties of local advisory councils.
104.116 Vocational education information data system.

NATIONAL AND STATE OCCUPATIONAL INFORMATION COORDINATING COMMITTEES

104.121 Establishment of National Occupational Information Coordinating Committee.

Sec.
104.122 Requirement to establish State occupational information coordinating committees.
104.123 Duties of the State occupational informational coordinating committee.

GENERAL APPLICATION

104.141 Requirement for filing a general application.

DEVELOPMENT OF FIVE-YEAR STATE PLAN

104.161 Submission of five-year State plan.
104.162 Representation required in the development of the five-year State plan.
104.163 Meetings of participating representatives.
104.164 State board adoption of the five-year State plan.
104.165 Public hearings on the five-year State plan.
104.171 Certification of plans.
104.181 Content of five-year State plan.
104.182 Procedures to assure compliance with the general application.
104.183 Assessment of employment opportunities.
104.184 Goals to meet employment needs.
104.185 Funding to meet employment needs.
104.186 Funding to meet program (purpose) needs.
104.187 Policies for eradicating sex discrimination.
104.188 Coordination between manpower training programs and vocational education programs.

DEVELOPMENT OF ANNUAL PROGRAM PLAN AND ACCOUNTABILITY REPORT

104.202 Due date of annual program plan.
104.203 Due date of annual accountability report.
104.204 Representation required in the development of the annual program plan and accountability report.
104.205 Meetings of participating representatives.
104.206 State board adoption of the annual program plan and accountability report.
104.207 Public hearing on the annual program plan and accountability report.
104.221 Content of annual program plan for fiscal year 1978.
104.222 Content of annual program plans for the fiscal years following 1978.
104.241 Content of the accountability report.

APPROVAL OF FIVE-YEAR STATE PLAN AND ANNUAL PROGRAM PLAN AND ACCOUNTABILITY REPORT

104.261 Conditions for approval of five-year State plan.
104.262 Conditions for approval of annual program plan and accountability report.
104.263 Notice of approval or disapproval.

WITHHOLDING OF APPROVAL OF PLAN

104.271 Disapproval of plan.

HEARINGS BEFORE THE COMMISSIONER ON AGENCY OR COUNCIL CHALLENGES TO THE FIVE-YEAR STATE PLAN OR THE ANNUAL PROGRAM PLAN

104.281 Opportunity for a hearing.
104.282 Appeal to the Commissioner.
104.283 Hearing.
104.284 Prehearing.
104.285 Right to counsel, witnesses, cross examination.
104.286 Evidence and standard of evidence.
Sec.
104.287 Determinations to be made by the hearing officer.
104.288 Commissioner's decision.
104.289 Appeals by State board or agency to the court of appeals.

SUSPENSION AND TERMINATION OF PAYMENTS FOR NONCOMPLIANCE

104.291 Suspension and termination of payments for noncompliance.

APPEAL TO THE COURTS

104.292 Appeal by State board on withholding of approval of State plan.
104.293 Appeal by eligible recipients to the court of appeals.

FISCAL REQUIREMENTS
FEDERAL SHARE

104.301 Application of Federal requirements.
104.302 Federal share of expenditures—annual program plan.
104.303 Federal share of expenditures—national priority programs.
104.304 Allowable expenditures for vocational education for national priority programs.
104.305 Federal share of expenditures—100 percent payments.
104.306 Federal share of expenditures—State administration.
104.307 Federal share of expenditures—local administration.

MINIMUM PERCENTAGES

104.311 Percentage requirements with respect to State distribution of Federal funds.
104.312 Minimum percentage for the handicapped.
104.313 Minimum percentage for the disadvantaged.
104.314 Minimum percentage for postsecondary and adult.
104.315 Expenditures for programs in secondary schools.

MAINTENANCE OF EFFORT

104.321 Maintenance of fiscal effort at the State level.
104.322 Withholding of payments.
104.323 Five percent rule.
104.324 Unusual circumstance rule.
104.325 Maintenance of fiscal effort at the local level.
104.326 Withholding of payments.
104.327 Exceptions.
104.328 Maintenance of fiscal effort by postsecondary educational institutions.
104.329 Withholding of payments.
104.330 Exceptions.

STATE EVALUATION

104.401 Purpose.
104.402 Evaluation by State board.
104.403 Use of results of evaluation.
104.404 Special data on completers and leavers.
104.405 Assurance of compatible data.

Subpart 2—Basic Grants

GENERAL PURPOSES

104.501 Authorization of grants.
104.502 Use of funds under the basic grant.

VOCATIONAL EDUCATION PROGRAMS

104.511 Use of funds.
104.512 Vocational instruction.
104.513 Activities of vocational education student organizations.
104.514 Vocational instruction under contract.
104.515 Apprenticeship programs.

WORK STUDY PROGRAMS

Sec.
104.521 Use of funds.
104.522 Policy and procedure for work-study programs.
104.523 Requirements of work-study programs.

COOPERATIVE VOCATIONAL EDUCATION PROGRAMS

104.531 Use of funds.
104.532 Assurances in five-year State plan.
104.533 Students in nonprofit private schools.

ENERGY EDUCATION

104.541 Use of funds.
104.542 Applications by postsecondary educational institutions.
104.543 Solar energy.

CONSTRUCTION OF AREA VOCATIONAL EDUCATION SCHOOL FACILITIES

104.551 Use of funds.
104.552 Types of facilities.
104.553 Construction requirements.

PROVISION OF STIPENDS

104.571 Use of funds.
104.572 Restrictions on payment of stipends.
104.573 Application for payment of stipends by eligible recipients.
104.574 Rates for stipends.

PLACEMENT SERVICES FOR STUDENTS WHO HAVE SUCCESSFULLY COMPLETED VOCATIONAL EDUCATION PROGRAMS

104.581 Use of funds.
104.582 Restrictions on placement services.
104.583 Application for funds by eligible recipients.

INDUSTRIAL ARTS

104.591 Use of funds.
104.592 Industrial arts programs.

SUPPORT SERVICES FOR WOMEN

104.601 Use of funds.
104.602 Types of support services.
104.603 Support to increase number of women instructors.

DAY CARE SERVICES FOR CHILDREN OF STUDENTS

104.611 Use of funds.
104.612 Day care services.

VOCATIONAL EDUCATION PROGRAMS FOR DISPLACED HOMEMAKERS AND OTHER SPECIAL GROUPS

104.621 Use of funds.
104.622 Scope of programs.

CONSTRUCTION AND OPERATION OF RESIDENTIAL VOCATIONAL SCHOOLS

104.631 Use of funds.
104.632 Residential vocational schools.
104.633 Special considerations for residential vocational schools.
104.634 Construction requirements.

Subpart 3—Program Improvement and Supportive Services

104.701 Authorization of grants.

PROGRAM IMPROVEMENT

104.702 Purpose.
104.703 Research coordinating unit.
104.704 Contract requirements.
104.705 Use of funds for research programs.
104.706 Use of funds for exemplary and innovative programs.
104.707 Disposition of exemplary and innovative programs.
104.708 Use of funds for curriculum development programs.

VOCATIONAL GUIDANCE AND COUNSELING

Sec.
104.761 Purpose.
104.762 Conformity with five-year State plan.
104.763 Kinds of programs, services, and activities.
104.764 Special emphasis.

VOCATIONAL EDUCATION PERSONNEL TRAINING

104.771 Purpose.
104.772 Conformity with five-year State plan.
104.773 Eligible participants.
104.774 Types of training.
104.775 Grants or contracts.
104.776 Stipends to trainees.

GRANTS TO OVERCOME SEX BIAS AND SEX STEREOTYPING

104.791 Purpose.
104.792 Conformity with five-year State plan.
104.793 Types of projects.

Subpart 4—Special Programs for the Disadvantaged

104.801 Grants to States for special programs for the disadvantaged.
104.802 Use of funds.
104.803 Students in nonprofit private schools.
104.804 Criteria of need and eligibility.

Subpart 5—Consumer and Homemaking Education

104.901 Grants to States for consumer and homemaking education.
104.902 Use of funds.
104.903 Programs in consumer and homemaking education.
104.904 Purpose of educational programs in consumer and homemaking education.
104.905 Ancillary services.
104.906 Federal share.

AUTHORITY: Secs. 101-195 of Title II of Pub. L. 94-482 as further amended by Pub. L. 95-40 (20 U.S.C. 2301 to 2461), unless otherwise noted.

Subpart 1—State Administration

§ 104.1 Scope.

Part 104 contains regulations interpreting or implementing Part A of Title I of the Vocational Education Act of 1963, as amended by Title II of the Education Amendments of 1976, Pub. L. 94-482 (referred to as "the Act").

(Secs. 101 through 150, 195; 20 U.S.C. 2301.)

§ 104.2 Purpose.

(a) The purpose of Part A of the Act, as stated in section 101 of the Act, the "Declaration of Purpose," is to assist States in improving planning in the use of all resources available to the States for vocational education and manpower training by involving a wide range of agencies and individuals concerned with education and training within the State in the development of the vocational education plans.

It is also the purpose of this part to authorize Federal grants to States to assist them—

(1) To extend, improve, and, where necessary, maintain existing programs of vocational education,

(2) To develop new programs of vocational education,

(3) To develop and carry out such programs of vocational education within each State so as to overcome sex discrimination and sex stereotyping in vocational education programs (including programs of homemaking), and thereby furnish equal educational opportunities in vocational education to persons of both sexes, and

(4) To provide part-time employment for youths who need the earnings from such employment to continue their vocational training on a full-time basis, so that persons of all ages in all communities of the State, those in high school, those who have completed or discontinued their formal education and are preparing to enter the labor market, those who have already entered the labor market, but need to upgrade their skills or learn new ones, those with special educational handicaps, and those in postsecondary schools, will have ready access to vocational training or retraining which is of high quality, which is realistic in the light of actual or anticipated opportunities for gainful employment, and which is suited to their needs, interests, and ability to benefit from such training.

(b) The purpose of these regulations is to assist the States, local educational agencies, postsecondary institutions, and other institutions capable of carrying out vocational education programs, to administer the federally assisted State programs of vocational education under the Act.

(Sec. 101; 20 U.S.C. 2301.)

§ 104.3 Applicability of General Education Provisions Regulations.

Provisions in Parts 100, 100b, and 100c of the General Education Provisions Regulations (45 CFR Parts 100, 100b, and 100c), entitled "General Provisions for Office of Education Programs," are applicable to programs under the Act, except for the following sections:

(a) Section 100b.16—Implementation of application procedures;

(b) Section 100b.18—General application;

(c) Section 100b.18—Annual program plan;

(d) Section 100b.19—State plan requirements;

(e) Section 100b.35(b)—Effective dates of application, plans, and amendments;

(f) Section 100b.92(b)—Matching and cost sharing;

(g) Section 100b.93—Valuation of in-kind contributions from third parties; and

(h) Section 100b.94—Supporting records for in-kind contributions from third parties.

(20 U.S.C. 2301 et seq.)

§ 104.4 Cross reference to definitions.

Definitions necessary for the understanding of Parts 104 and 105 are set forth in Part C of Title I of the Act (section 195 of the Act) and as Appendix A at the end of Part 105 or these regulations. Some additional definitions necessary for the understanding of Part 105 appear in Part 105.

(Sec. 195; 20 U.S.C. 2461.)

§ 104.5 Requirements under Part B of the Education of the Handicapped Act.

(a) Regulations under Part B of the Education of the Handicapped Act are located in 45 CFR Part 121a.

(20 U.S.C. 1417(b).)

(b) Section 612(6) of the Education of the Handicapped Act requires that the State educational agency be responsible for ensuring that all educational programs for handicapped children within the State, including all of those programs administered by any other State or local agency, are under the general supervision of persons responsible for educational programs for handicapped children in the State educational agency.

(20 U.S.C. 1412(6).)

(c) Section 613(a)(2) of the Education of the Handicapped Act requires each State to insure that funds provided under this part to assist in the education of handicapped children are used only in a manner consistent with a goal of providing a free appropriate public education for all handicapped children.

(d) Paragraph (c) of this section does not limit the requirements of this Part or the statutes under which this part is authorized.

(20 U.S.C. 1413(a)(2).)

(e) Section 612(6) of the Education of the Handicapped Act requires that any activity to assist the education of handicapped children under this Part shall meet the educational standards of the State educational agency.

(20 U.S.C. 1412(6).)

(f) Section 616(a)(2)(B) of the Education of the Handicapped Act provides that the Commissioner may withhold payments available under this Part for assisting the education of handicapped children:

(1) For failure to comply substantially with any provision of section 612 or 613 of the Education of the Handicapped Act; or

(2) In the administration of the annual program plan under Part B of the Education of the Handicapped Act for failure to comply with:

(i) Any provision of Part B of the Education of the Handicapped Act; or

(ii) Any requirements in the application of a local educational agency or intermediate educational unit approved by the State educational agency under that annual program plan.

(g) The Commissioner will use the notice and hearing procedures in section 616 of the Education of the Handicapped Act before withholding payments under this section.

(20 U.S.C. 1416.)

STATE BOARD

§ 104.31 Establishment of State board.

(a) A State desiring to participate in programs under the Act shall, consistent with State law, designate or establish a

State board or agency which shall be the sole State agency responsible for the administration, or for the supervision of administration, of programs under the Act.

(b) The State board is solely accountable to the Commissioner for the State's expenditure of Federal vocational education funds.

(Sec. 104(a)(1); 20 U.S.C. 2304; Sen. Rept. No. 94-882, p. 72.)

§ 104.32 Responsibilities of the State board.

The responsibilities of the State board include (but are not limited to):

(a) Coordination of the development of policy with respect to programs under the Act (as set forth in §§ 104.162, 104.163, 104.204, and 104.205);

(b) Coordination of the development of the five-year State plan (as set forth in § 104.181), the annual program plan (as set forth in §§ 104.221 and 104.222), and the accountability report (as set forth in § 104.241);

(c) The submission to the Commissioner of the five-year State plan, the annual program plan, and the accountability report; and

(d) Consultation with the State advisory council on vocational education and with other State agencies, councils, and individuals (as set forth in § 104.162).

(Sec. 104(a)(1) (A), (B), and (C); 20 U.S.C. 2304.)

(e) Cooperation with the Administrator of the National Center for Educational Statistics in the development and submission of information required for a national vocational education data reporting and accounting system.

(Sec. 161(a); 20 U.S.C. 2391.)

§ 104.33 Delegation of functions.

The State board may delegate any of its responsibilities (except those responsibilities set forth in § 104.32), in whole or in part, to one or more appropriate agencies.

(Sec. 104(a)(1); 20 U.S.C. 2304.)

§ 104.34 State administration and leadership.

The State board shall provide for a State staff sufficiently qualified by education and experience and in sufficient numbers to enable the State board to carry out its functions under the State plan. The State board staff shall include a full-time State director.

(Implements sec. 104(a)(1) and sec. 106(a)(1).)

FULL-TIME PERSONNEL AND FUNCTIONS TO ELIMINATE SEX DISCRIMINATION AND SEX STEREOTYPING

§ 104.71 Scope.

Sections 104.72 through 104.76 apply only to the fifty States and the District of Columbia. (These sections do not apply to the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, Northern Mariana Islands, or the Trust Territory of the Pacific Islands.)

(Sec. 104(b)(3); 20 U.S.C. 2304.)

§ 104.72 Selection of full-time personnel to eliminate sex discrimination and sex stereotyping.

(a) A State desiring to participate in the programs authorized by the Act shall select personnel to work full time to assist the State board in fulfilling the purposes of the Act concerned with:

(1) Furnishing equal educational opportunities in vocational education programs to persons of both sexes; and

(2) Eliminating sex discrimination and sex stereotyping from all vocational education programs.

(Secs. 101(3), 104(b)(1); 20 U.S.C. 2301, 2304.)

(b) In selecting the full-time professional personnel, the State shall match the qualifications of the applicants with the responsibilities of the job.

(Implements Sec. 104(b)(1); 20 U.S.C. 2304.)

§ 104.73 Definitions.

The following definitions apply for the purposes of §§ 104.72 through 104.76 and throughout the Act and regulations.

(a) "Sex bias" means behaviors resulting from the assumption that one sex is superior to the other.

(b) "Sex stereotyping" means attributing behaviors, abilities, interests, values, and roles to a person or group of persons on the basis of their sex.

(c) "Sex discrimination" means any action which limits or denies a person or a group of persons opportunities, privileges, roles, or rewards on the basis of their sex.

(Implements Sec. 104(b); 20 U.S.C. 2304.)

§ 104.74 Funds for full-time personnel and functions.

(a) Each State shall expend not less than $50,000 in each fiscal year from funds available under basic grants (section 120 of the Act) to support the personnel working full time to carry out the functions set forth in § 104.75.

(Secs. 104(b)(2), 120(b)(1)(F); 20 U.S.C. 2304, 2330.)

(b) Funds set aside under paragraph (a) of this section shall be used for:

(1) Salaries for full-time professional staff;

(2) Salaries for support staff; and

(3) Travel and other expenses directly related to the support of personnel in carrying out the functions set forth in § 104.75.

(Implements Sec. 104(b); 20 U.S.C. 2304.)

§ 104.75 Functions of full-time personnel.

Personnel designated under § 104.72 shall work full time to:

(a) Take action necessary to create awareness of programs and activities in vocational education designed to reduce sex bias and sex stereotyping in all vocational education programs, including assisting the State board in publicizing the public hearings on the State plan in accordance with § 104.165(a);

(b) Gather, analyze, and disseminate data on the status of men and women students and employees in vocational education programs of the State;

(c) Develop and support actions to correct problems brought to the attention of this personnel through activities carried out under paragraph (b) and § 104.76, including creating awareness of the Title IX complaint process;

(d) Review the distribution of grants and contracts by the State board to assure that the interests and needs of women are addressed in all projects assisted under this Act;

(e) Review all vocational education programs (including work-study programs, cooperative vocational education programs, apprenticeship programs, and the placement of students who have successfully completed vocational education programs) in the State for sex bias;

(f) Monitor the implementation of laws prohibiting sex discrimination in all hiring, firing, and promotion procedures within the State relating to vocational education;

(g) Assist local educational agencies and other interested parties in the State in improving vocational education opportunities for women; and

(h) Make available to the State board, the State advisory council, the National Advisory Council on Vocational Education, the State Commission on the Status of Women, the Commissioner, and the general public, including individuals and organizations in the State concerned about sex bias in vocational education, information developed under this section;

(Sec. 104(b)(1); 20 U.S.C. 2304.)

(i) Review the self-evaluations required by Title IX; and

(Implements Sec. 104(b)(1); 20 U.S.C. 2304.)

(j) Review and submit recommendations with respect to overcoming sex bias and sex stereotyping in vocational education programs for the five-year State plan and its annual program plan prior to their submission to the Commissioner for approval.

(Secs. 104(b)(1), 109(a)(3)(B); 20 U.S.C. 2304, 2309.)

§ 104.76 Studies to carry out functions.

A State may use funds available under section 130 of the Act to support studies necessary to carry out the functions set forth in § 104.75.

(Implements Sec. 104(b)(1); 20 U.S.C. 2304.)

STATE ADVISORY COUNCIL

§ 104.91 Establishment and certification.

(a) *Establishment.* A State which desires to receive funds under the Act and the regulations in this part for any fiscal year shall establish a State advisory council. The council shall be appointed

by the Governor or, in a State in which the members of the State board are elected, by the State board itself.

(Sec. 105(a); 20 U.S.C. 2305.)

(b) *Appointment by the State board.* In order for the appointment power to be vested in the State board, under the authority of paragraph (a) of this section, a majority of its members must be individuals elected by the State legislature or directly by the eligible voters of the State or of the districts which the individuals represent.

(Interprets Sec. 105(a); 20 U.S.C. 2305.)

(c) *Certification.* The appointing authority, required by paragraph (a) of this section, shall certify to the Commissioner the establishment and membership of its State advisory council not less than 90 calendar days before the beginning of each fiscal year.

(Sec. 105(b); 20 U.S.C. 2305.)

§ 104.92 Membership.

(a) *Required representation.* The membership of the State advisory council shall include one or more individuals who:

(1) Represent, and are familiar with, the vocational needs and problems of management in the State;

(2) Represent, and are familiar with, the vocational needs and problems of labor in the State;

(3) Represent, and are familiar with, the vocational needs and problems of agriculture in the State;

(4) Represent State industrial and economic development agencies;

(5) Represent community and junior colleges;

(6) Represent other institutions of higher education, area vocational schools, technical institutes, and post-secondary agencies or institutions which provide programs of vocational or technical education and training;

(7) Have special knowledge, experience, or qualifications with respect to vocational education but are not involved in the administration of State or local vocational education programs;

(8) Represent, and are familiar with, public programs of vocational education in comprehensive secondary schools;

(9) Represent, and are familiar with, nonprofit private schools;

(10) Represent, and are familiar with, vocational guidance and counseling services;

(11) Represent State correctional institutions;

(12) Are vocational education teachers presently teaching in local educational agencies;

(13) Are currently serving as superintendents or other administrators of the local educational agencies;

(14) Are currently serving on local school boards;

(15) Represent the State Manpower Services Council established pursuant to section 107 of the Comprehensive Employment and Training Act of 1973;

(16) Represent school systems with large concentrations of persons who have special academic, social, economic, and cultural needs and of persons who have limited English-speaking ability;

(17) Are women with backgrounds and experiences in employment and training programs, and who are knowledgeable with respect to the special experiences and problems of sex discrimination in job training, and employment, and of sex stereotyping in vocational education, including women who are members of minority groups having special knowledge of the problems of discrimination in job training and employment against women in minority groups;

(18) Have special knowledge, experience, or qualifications with respect to the special educational needs of physically or mentally handicapped persons;

(19) Represent the general public, including at least one person representing and knowledgeable about the poor and disadvantaged; and

(20) Are vocational education students who are not qualified for membership under any of the preceding clauses of this sentence.

(Sec. 105(a); 20 U.S.C. 2305.)

(b) *Special considerations.* The appointing authority, pursuant to paragraph (a) of this section, shall insure that:

(1) The State advisory council has as a majority of its members persons who are not educators or administrators in the field of education;

(2) Members of the State advisory council do not represent more than one category;

(Sec. 105(a); 20 U.S.C. 2305.)

(3) There is appropriate representation of both sexes, racial and ethnic minorities, and the various geographic regions of the State. The Commissioner considers the term "appropriate representation" to be representation which generally reflects the percentage of women or minorities in the population of the State or the percentage of women or minorities in the work force of the State.

(Implements Sec. 105(a); 20 U.S.C. 2305.)

(4) In order to avoid any conflict of interest, the membership of the State advisory council excludes members of the State board and members of its staff who are directly involved in State administration of vocational education.

(Implements Sec. 105 (d), (e); 20 U.S.C. 2305.)

(c) *Term of appointment.* Members of the State advisory council shall be appointed for terms of three years except that:

(1) In the case of the members appointed for fiscal year 1978, one-third of the membership shall be appointed for terms of one year each and one-third shall be appointed for terms of two years each;

(2) An appointment to fill a vacancy shall be for the term that remains unexpired; and

(Sec. 105(a); 20 U.S.C. 2305.)

(3) Members serving on the State advisory council on October 1, 1977, may continue to serve for the terms for which they were appointed, but for not more than two fiscal years unless reappointed.

(Sec. 204(b); 20 U.S.C. 2301 note.)

§ 104.93 Functions and responsibilities.

The State advisory council shall:

(a) Advise the State board in the development of the five-year State plan submitted under the authority of § 104.181, the annual program plan submitted under the authority of §§ 104.221, and 104.222, and the accountability report submitted under the authority of § 104.241. A statement describing its consultation with the State board shall be submitted with the five-year State plan, and the annual program plan and accountability report under § 104.171(f).

(Sec. 105(d)(1); 20 U.S.C. 2305.)

(b) Advise the State board on policy matters arising out of the administration of programs under the approved five-year State plan, the annual program plan, and the accountability report;

(Sec. 105(d)(1); 20 U.S.C. 2305.)

(c) Evaluate vocational education programs (including programs to overcome sex bias), services, and activities under the annual program plan, and publish and distribute the results thereof;

(Sec. 105(d)(2); 20 U.S.C. 2305.)

(d) Assist the State board in developing plans for State board evaluations under the authority of § 104.401 and monitor these evaluations;

(Sec. 112(b)(2); 20 U.S.C. 2312.)

(e) Prepare and submit through the State board to the Commissioner and to the National Advisory Council an annual evaluation report, accompanied by any additional comments of the State board as the State board deems appropriate;

(Sec. 105(d)(3); 20 U.S.C. 2305.)

(f) Identify, after consultation with the State Manpower Services Council, the vocational education and employment and training needs of the State and assess the extent to which vocational education, employment training, vocational rehabilitation, special education, and other programs assisted under this and related Acts represent a consistent, integrated, and coordinated approach to meeting these needs;

(Interprets Sec. 105(d)(4)(A); 20 U.S.C. 2305.)

(g) Comment, at least annually, on the reports of the State Manpower Services Council;

(Sec. 105(d)(4)(B); 20 U.S.C. 2305.)

(h) Prepare and submit to the Commissioner within 60 calendar days after the Commissioner's acceptance of certification of establishment and membership, submitted pursuant to § 104.91(c), an annual budget covering the proposed

expenditures of the State advisory council for the following fiscal year; and

(Implements Sec. 105(f); 20 U.S.C. 2305.)

(l) Provide technical assistance to eligible recipients and local advisory councils as may be requested by the recipients to establish and operate local advisory councils.

(Sec. 105(g); 20 U.S.C. 2305.)

§ 104.94 Meetings and rules.

The State advisory council shall meet within 30 calendar days after certification has been accepted by the Commissioner and shall select from among its membership a chairperson. The time, place, manner of meetings, as well as the councils operating procedures and staffing, shall be as provided by the rules of the State advisory council. The rules shall provide for not less than one public meeting each year at which the public is given an opportunity to express views concerning the vocational education program of the State.

(Sec. 105(c); 20 U.S.C. 2305.)

§ 104.95 Staff and services.

(a) The State advisory council is authorized:

(1) To obtain the services of professional, technical, and clerical personnel as may be necessary to enable it to carry out its functions described in § 104.93. Such personnel shall not include staff members of the State board and shall be subject only to the supervision and direction of the State advisory council with respect to all services performed by them.

(2) To contract for such services as may be necessary to carry out its evaluation functions, independent of programmatic and administrative control by other State boards, agencies, and individuals.

(Implements sec. 105(e); 20 U.S.C. 2305.)

(b) Members of the State advisory council and its staff, while serving on the business of the council, may receive subsistence, travel allowances, and compensation in accordance with State law, regulations, and practices applicable to persons performing comparable duties and services.

(Implements Sec. 105(e); 20 U.S.C. 2305.)

§ 104.96 Fiscal control.

(a) The State advisory council shall designate an appropriate State agency or other public agency, eligible to receive funds under the Act, to act as its fiscal agent for purposes of disbursement and accounting and for having its accounts audited at least every two years. The fiscal agent shall send a copy of the audit report to the Commissioner.

(Implements Sec. 105(f)(2); 20 U.S.C. 2305.)

(b) The expenditure of council funds is determined solely by the State advisory council for carrying out its function except as provided in § 104.95(b). Council funds may not be diverted or reprogrammed for any other purpose by any State board, agency, or individual.

(Sec. 105(f)(2); 20 U.S.C. 2305.)

(c) All expenditures of council funds shall be in accordance with the budget approved by the Commissioner under the authority of § 104.93(h).

(Implements Sec. 105(f)(2); 20 U.S.C. 2305.)

(d) The State advisory council shall submit to the Commissioner a financial status report within 90 days after the end of the fiscal year.

(45 CFR 100b.403.)

§ 104.97 Annual evaluation report.

The State advisory council shall prepare and submit to the Commissioner and to the National Advisory Council on Vocational Education, through the State board, within 90 days after the end of the fiscal year an annual evaluation report under the authority of § 104.93(e). This report shall include:

(a) The results of the evaluations by the State advisory council of the effectiveness of programs, services, and activities carried out in the year under review in meeting the program goals set forth in the five-year State plan and the annual program plan.

(Sec. 105(d)(3)(A); 20 U.S.C. 2305.)

(b) A review of the program evaluation results developed by the State under the authority of § 104.401;

(c) A review of the analysis of the distribution of Federal funds within the State submitted by the State according to the annual program plan and the accountability report;

(Sec. 105(d)(3)(A); 20 U.S.C. 2305.)

(d) Recommended changes in programs, services, and activities as may be considered necessary by the State advisory council based on the results of its evaluation;

(Sec. 105(d)(3)(B); 20 U.S.C. 2305.)

(e) Comments on the reports of the State Manpower Services Council; and

(Sec. 105(d)(4)(B); 20 U.S.C. 2305.)

(f) Identification of the vocational education and employment and training needs of the State and the assessment of the extent to which vocational education, employment training, vocational rehabilitation, special education, and other programs assisted under this and related Act represent a consistent, integrated, and coordinated approach to meeting such needs.

(Sec. 105(d)(4)(A); 20 U.S.C. 2305.)

LOCAL ADVISORY COUNCILS

§ 104.111 Establishment of local advisory councils.

(a) Each eligible recipient (that is, each local educational agency or postsecondary educational institution which receives Federal assistance under the Act) shall establish a local advisory council on vocational education.

(b) The local advisory council may be established for:

(1) Program areas;

(2) Schools;

(3) The community; or

(4) The region in which the eligible recipient is located.

(c) The local advisory council shall be composed of representatives of the general public including at least a representative of:

(1) Business;

(2) Industry; and

(3) Labor.

(Sec. 105(g)(1); 20 U.S.C. 2305.)

(d) Each eligible recipient shall establish a local advisory council which has an appropriate representation of both sexes and an appropriate representation of the racial and ethnic minorities found in the program areas, schools, community, or region which the local advisory council serves.

(e) An eligible recipient may form a local advisory council composed of representatives from several craft committees, or representatives of several school councils, having the requisite representation in paragraph (c) of this section.

(Implements Sec. 105(g)(1); 20 U.S.C. 2305.)

§ 104.112 Duties of local advisory councils.

(a) The local advisory council shall advise the eligible recipient on:

(1) Current job needs; and

(2) The relevance of programs (courses) being offered by the local educational agency or postsecondary educational agency in meeting current job needs.

(Sec. 105(g)(1); 20 U.S.C. 2305.)

(b) The local advisory council shall consult with the eligible recipient in developing its application to the State board.

(Sec. 106(a)(4)(A); 20 U.S.C. 2306.)

VOCATIONAL EDUCATION INFORMATION DATA SYSTEM

§ 104.116 Vocational education data system.

(a) The Commissioner and the Administrator of NCES will jointly develop information elements and uniform definitions for a national vocational education data reporting and accounting system.

(b) This system will include information resulting from the evaluations under section 112(b) of the Act (§§ 104.402 and 104.404) and other information on vocational:

(1) Students (including information on their race and sex);

(2) Programs;

(3) Program completers and leavers;

(4) Staff;

(5) Facilities; and

(6) Expenditures.

(c) This system will be compatible insofar as possible with the occupational information data system developed under section 161(b) of the Act by the National Occupational Information Coordinating Committee and with other in-

formation systems involving data on programs assisted under CETA.

(Interprets 161(a); 20 U.S.C. 2391.)

NATIONAL AND STATE OCCUPATIONAL INFORMATION COORDINATING COMMITTEES

§ 104.121 Establishment of National Occupational Information Coordinating Committee.

Section 161(b) of the Act establishes a National Occupational Information Coordinating Committee composed of the Commissioner of Education and the Administrator of the National Center for Education Statistics, from the Department of Health, Education, and Welfare, and the Assistant Secretary of Labor for Employment and Training and the Commissioner of the Bureau of Labor Statistics, from the Department of Labor.

(Sec. 161(b); 20 U.S.C. 2391(b).)

§ 104.122 Requirement to establish State occupational information coordinating committees.

(a) Each State receiving assistance under the Act is required by section 161(b)(2) of the Act to establish a State occupational information coordinating committee by September 30, 1977.

(Implements Sec. 161(b)(2); 20 U.S.C. 2391.)

(b) The State occupational information coordinating committee shall be composed of a representative of each of the following:

(1) The State board;

(2) The State employment security agency;

(3) The State Manpower Services Council; and

(4) The agency administering the vocational rehabilitation program.

(Sec. 161(b)(2); 20 U.S.C. 2391.)

(c) The representatives shall be selected by the respective State board, agency, or council.

(Implements Sec. 161(b)(2); 20 U.S.C. 2391.)

(Implements Secs. 103(a)(1)(A), 161(b)(2); 20 U.S.C. 2302, 2391)

§ 104.123 Duties of the State occupational information coordinating committee.

(a) The State occupational information coordinating committee, with funds available to it from the National Occupational Information Coordinating Committee shall implement an occupational information system in the State which will meet the common needs for the planning for, and operation of, programs of the State board assisted under this Act and of the administering agencies under the Comprehensive Employment Training Act.

(Sec. 161(b)(2); 20 U.S.C. 2391.)

(b) A State occupational information coordinating committee shall use funds received from the National Occupational Information Coordinating Committee in accordance with guidance, direction or standards adopted by the National Occupational Information Coordinating Committee.

(Implements Sec. 161(b)(2); 20 U.S.C. 2391.)

GENERAL APPLICATION

§ 104.141 Requirement for filing a general application.

(a) In order to participate in programs authorized under the Act, the State board for vocational education must submit to, and maintain on file with, the Commissioner a general application.

(Sec. 106(a); 20 U.S.C. 2306.)

(b) This general application must be signed by the executive officer of the State board and submitted by the State board to the Commissioner by July 1, 1977, for eligibility for Federal funds under the Act.

(c) This general application is filed only once with the Commissioner and shall remain in effect until the provisions of section 106 of the Act are changed or expire.

(Implements Sec. 106(a); 20 U.S.C. 2306; Sen. Rept. No. 94-882, pp. 68-72.)

(d) This general application is in lieu of the general application required by section 434(b) of the General Education Provisions Act.

(Sec. 106(b); 20 U.S.C. 2306.)

(e) The procedures to be used by the State board to carry out assurances 4, 5, 9, and 10 in the general application shall be included in the five-year State plan (§ 104.182).

(Implements Sec. 109(a)(1); 20 U.S.C. 2309.)

(f) This general application shall contain the following 12 assurances; of these, ten are set forth in section 106(a) of Act:

(1) that the State will provide for such methods of administration as are necessary for the proper and efficient administration of the Act;

(2) that the State board will cooperate with the State advisory council on vocational education in carrying out its duties pursuant to section 105 and with the agencies, councils, and individuals specified in sections 107 and 108 to be involved in the formulation of the five-year State plan and of the annual program plans and accountability reports;

(3) that the State will comply with any requests of the Commissioner for making such reports as the Commissioner may reasonably require to carry out his functions under this Act;

(4) that funds will be distributed to eligible recipients on the basis of annual applications which——

(A) have been developed in consultation (i) with representatives of the educational and training resources available in the area to be served by the applicant and (ii) with the local advisory council required to be established by this Act to assist such recipients,

(B)(i) describe the vocational education needs of potential students in the area or community served by the applicant and indicate how, and to what extent, the program proposed in the application will meet such needs, and (ii) describe how the findings of any evaluations of programs operated by such applicant during previous years, including those required by this Act, have been used to develop the program proposed in the application,

(C) describe how the activities proposed in the application relate to manpower programs conducted in the area by a prime sponsor established under the Comprehensive Employment and Training Act of 1973, if any, to assure a coordinated approach to meeting the vocational education and training needs of the area or community, and

(D) describe the relationship between vocational education programs proposed to be conducted with funds under this Act and other programs in the area or community which are supported by State and local funds;

and that any eligible recipient dissatisfied with final action with respect to any application for funds under this Act shall be given reasonable notice and opportunity for a hearing;

(5)(A) that the State shall, in considering the approval of such applications, give priority to those applicants which—

(i) are located in economically depressed areas and areas with high rates of unemployment, and are unable to provide the resources necessary to meet the vocational education needs of those areas without Federal assistance, and

(ii) propose programs which are new to the area to be served and which are designed to meet new and emerging manpower needs and job opportunities in the area and, where relevant, in the State and the Nation; and

(B) that the State shall, in determining the amount of funds available under this Act which shall be made available to those applicants approved for funding, base such distribution on economic, social and demographic factors relating to the needs for vocational education among the various populations and the various areas of the State, except that—

(i) the State will use as the two most important factors in determining this distribution (I) in the case of local educational agencies, the relative financial ability of such agencies to provide the resources necessary to meet the need for vocational education in the areas they service and the relative number or concentration of low-income families or individuals within such agencies, and (II) in the case of other eligible recipients, the relative financial ability of such recipients to provide the resources necessary to initiate or maintain vocational education programs to meet the needs of their students and the relative number or concentration of students whom they serve whose education imposes higher than average costs, such as handicapped students, students from low-income families, and students from families in which English is not the dominant language; and

(ii) the State will not allocate such funds among eligible recipients within the State on the basis of per capita enrollment or through matching of local expenditures on a uniform percentage basis, or deny funds to any recipient which is making a reasonable tax effort solely because such recipient is unable to pay the non-Federal share of the cost of new programs;

(6) that Federal funds made available under this Act will be so used as to supplement, and to the extent practicable, increase the amount of State and local funds that would in the absence of such Federal funds be made available for the uses specified in the Act, and in no case supplant such State or local funds;

(7) that the State will make provision for such fiscal control and fund accounting procedures as may be necessary to secure proper disbursement of, and accounting for, Federal

funds paid to the State (including such funds paid by the State to eligible recipients under this Act);

(8) that funds received under this Act will not be used for any program of vocational education (except personnel training programs under section 135, renovation programs under subpart 4 of part B, and homemaking programs under subpart 5 of this part) which cannot be demonstrated to prepare students for employment, be necessary to prepare individuals for successful completion of such a program, or be of significant assistance to individuals enrolled in making an informed and meaningful occupational choice as an integral part of a program of orientation and preparation;

(9) that the State has instituted policies and procedures to insure that copies of the State plan and annual program plan and accountability report and all statements of general policies, rules, regulations, and procedures issued by the State board and by any State agencies to which any responsibility is delegated by the State board concerning the administration of such plan and report will be made reasonably available to the public; and

(10) that the funds used for purposes of section 110(a) are consistent with the State plan submitted pursuant to section 613(a) of the Education of the Handicapped Act.

(Sec. 106(a); 20 U.S.C. 2306.)

(11) The State board shall also assure that it will cooperate with the Administrator of the National Center for Education Statistics, HEW, in supplying information and complying in its reports with the information elements and definition requirements, as specified in section 161(a) of the Act.

(Implements Sec. 161(a); 20 U.S.C. 2391.)

(12) The State board shall also assure that students served by Indian tribal organizations applying for or receiving funds under the Commissioner's discretionary prgorams, under authority of section 103(a)(1)(B) of the Act, shall be afforded the opportunity to participate in vocational education programs administered by the State.

(Implements Sec. 103(a)(1)(B); 20 U.S.C. 2303.)

Development of Five-Year State Plan

§ 104.161 Submission of five-year State plan.

Any State desiring to receive funds under the Act shall submit to the Commissioner a five-year State plan by:

(a) July 1, 1977, for fiscal years 1978 through 1982; and

(b) July 1, 1982, for fiscal years 1983 through 1987.

(Sec. 107(a)(1); 20 U.S.C. 2307)

§ 104.162 Representation required in the development of the five-year State plan.

In formulating its five-year State plan, the State board is required to involve the active participation of a representative of:

(a) The State agency having responsibility for secondary vocational education programs, designated by that agency;

(b) The State agency, if a separate agency exists, having responsibility for postsecondary vocational education programs, designated by that agency;

(c) The State agency, if a separate agency exists, having responsibility for community and junior colleges, designated by that agency;

(d) The State agency, if a separate agency exists, having responsibility for institutions of higher education in the State, designated by that agency;

(Sec. 107(a)(1); 20 U.S.C. 2307.)

(e) A local school board or committee, as designated by the appropriate appointing authority under State law;

(Interprets Sec. 107(a)(1)(E); 20 U.S.C. 2307.)

(f) Vocational education teachers, as designated by the appropriate appointing authority under State law;

(Interprets Sec. 107(a)(1)(F); 20 U.S.C. 2307.)

(g) Local school administrators, as designated by the appropriate appointing authority under State law;

(Interprets Sec. 107(a)(1)(G); 20 U.S.C. 2307.)

(h) The State Manpower Services Council appointed under the authority of section 107(a)(2)(A)(i) of the Comprehensive Employment and Training Act of 1973, designated by that Council;

(i) The State agency or commission responsible for comprehensive planning in postsecondary education, which planning reflects programs offered by public, private nonprofit, and proprietary institutions, and includes occupational programs at a less-than-baccalaureate degree level, if a separate agency or commission exists, designated by that agency or commission; and

(j) The State advisory council on vocational education, designated by that council.

(Sec. 107(a)(1); 20 U.S.C. 2307.)

§ 104.163 Meetings of participating representatives.

The State board shall convene, as a group, the representatives of the agencies, councils, and individuals specified in § 104.162 for at least four meetings during the development of the five-year State plan. These meetings will be convened to accomplish the following purposes:

(a) First meeting: To plan for the development of the first draft of the five-year State plan;

(b) Second meeting: To consider the first draft of the five-year State plan;

(c) Third meeting: To consider the draft of the five-year State plan after it has been rewritten to reflect the results of the second meeting of the planning group; and

(d) Fourth meeting: To recommend for adoption the final five-year State plan.

(Sec. 107(a)(1); 20 U.S.C. 2307.)

§ 104.164 State board adoption of the five-year State plan.

(a) If the participating agencies, councils, and individuals are not able to agree upon the provisions of the five-year State plan, the State board will make make a final decision.

(b) In accordance with § 104.171(b)(1), the State board shall include in the five-year State plan:

(1) Any recommendation which is rejected by the State board indicating its source (i.e., the name of the individual and agency or council affiliation); and

(2) The reasons of the State board for rejecting the recommendation.

(Sec. 107(a)(1); 20 U.S.C. 2307.)

§ 104.165 Public hearings on the five-year State plan.

(a) In formulating the five-year State plan, the State board is required to conduct a series of public hearings. This series of public hearings shall be conducted:

(1) During the development, prior State plan;

(2) After giving sufficient public notice; and

(3) Throughout all regions of the State.

(b) The purpose of these public hearings is to provide the opportunity for all segments of the population of the State to give their views on:

(1) The goals which ought to be adopted in the State plan;

(2) The programs to be offered under the State plan;

(3) The allocation of responsibility for programs (courses) among the various levels of education and among the various institutions of the State; and

(4) The allocation of local, State, and Federal resources to meet these goals.

(c) In accordance with § 104.171(d), the State board shall include in the five-year State plan:

(1) The views expressed at the public hearings or comments submitted in writing;

(2) A description of how these views are reflected in the provisions of the five-year State plan; and

(3) The reasons for rejecting any view which is not accepted for inclusion in the five-year State plan.

(Sec. 107(a)(2); 20 U.S.C. 2307.)

§ 104.171 Certification of plans.

As used in this section, the term "plans" refers to the five-year State plan and the annual program plan and accountability report. The plans submitted shall include, as attachments, the following certifications:

(a) *Certification by the State attorney general.* The State attorney general, or other official designated in accordance with State law to advise the State board on legal matters, shall certify that the State board named in the plan is the sole agency which has authority under State law to submit the plan and to administer or supervise the administra-

tion of vocational education, and that all the plan's provisions with respect to the use of funds under the Act can be carried out by the State.

(Implements Sec. 104(a)(1); 20 U.S.C. 2304.)

(b) *Certification of involvement of designated agencies.*

(1) The State board shall certify that each of the agencies, councils, and individuals required in § 104.162 has been afforded the opportunity to be involved. The State board shall include in this certification all recommendations rejected by the Board, complete identification of the agency, council, or individual having made the rejected recommendation and the reasons for rejecting these recommendations, as required by § 104.164(b). This certification shall also indicate the meetings held under the authority of § 104.163.

(2) Each representative required in § 104.162 shall certify that he or she has had the opportunity to participate actively in formulating the plan.

(Implements Secs. 104(a)(3), 107(a)(1); 20 U.S.C. 2304, 2307.)

(c) *Certification of delegation.* The State board shall certify any delegation by the State board of responsibilities for administration, operation, or supervision of vocational education programs to other appropriate State agencies. The statement shall set forth the procedures used for delegation, the specific responsibilities delegated, and the specific agency or agencies involved.

(Implements Sec. 104(a)(2); 20 U.S.C. 2304.)

(d) *Certification of public hearings.* The State board shall certify the method used to provide reasonable notice and opportunity for public hearings throughout all regions of the State in order to permit all segments of the population to give their views on the goals for vocational educational which ought to be adopted in the plan in terms of the elements listed in §§ 104.165(b) and 104.207 (b). The statement shall also include the views expressed at the hearings and a description of how those views are reflected in the plan. If any views are not reflected, the statement shall set out the reasons for rejecting them.

(Implements Sec. 107(a)(2), 108(a)(2); 20 U.S.C. 2307, 2308.)

(e) *Certification of local advisory councils.* The State board shall certify that eligible recipients within the State have been notified of their responsibility to establish local advisory councils. The State board shall also certify that eligible recipients receiving assistance under the Act to operate vocational education programs have established these councils.

(Implements Sec. 105(g); 20 U.S.C. 2305.)

(f) *Certification of consultation with State advisory council.* The State advisory council shall certify that the plan was prepared in consultation with the council.

(Implements Sec. 105(d); 20 U.S.C. 2305.)

(g) *Certification by full-time personnel of opportunity to review the plans.* The personnel assigned full time to review programs within the State to assure equal access to vocational education by both men and women shall certify that the opportunity to review the plan has been afforded.

(Implements Sec. 109(a)(3)(B); 20 U.S.C. 2309.)

(h) *Certification of adoption by State board.* The State board shall certify that development of the plan has been coordinated with the agencies, councils, and individuals as required by § 104.162 and that the final decision has been adopted by the State board, and that the plan constitutes the basis for operation and administration of the State's vocational education program.

(Implements Sec. 104(a)(1); 20 U.S.C. 2304.)

§ 104.181 Content of five-year State plan.

The State board shall submit the five-year State plan to the Commissioner, through the appropriate HEW Regional Office, by the July 1st preceding the beginning of the first fiscal year for which the plan is to take effect. The plan shall be composed of the following two parts:

(a) Procedures for carrying out certain assurances of the general application as required in § 104.182; and

(b) Program provisions as required in §§ 104.183 through 104.188.

(Sec. 107(b); 20 U.S.C. 2307.)

§ 104.182 Procedures to assure compliance with the general application.

The State board in its five-year State plan shall:

(a) Describe the information which the State board will require in local applications in order to meet the requirements of § 104.141(f)(4);

(Sec. 106(a)(4); 20 U.S.C. 2306.)

(b) Describe the procedures for affording eligible recipients reasonable notice of an opportunity for a hearing, for conducting the hearing, for providing a written record of the hearing, and for informing the recipient in writing of the decisions and reasons therefor;

(Implements Sec. 106(a)(4); 20 U.S.C. 2306.)

(c) Describe how the State board, for purposes of giving priority to applications, determines:

(1) Economically depressed areas and areas with high rates of unemployment which are unable to provide the resources necessary to meet the vocational education needs without Federal assistance; and

(2) Programs new to the area which are designed to meet new and emerging manpower needs and job opportunities in the area (and, where relevant, in the State and Nation);

(Implements Sec. 106(a)(5)(A); 20 U.S.C. 2306.)

(d) Describe the policies and procedures by which the State board determines how the amount of funds available under this Act will be made available to those applicants approved for funding, using the factors specified in § 104.141(f)(5)(B);

(Sec. 106(a)(5)(B); 20 U.S.C. 2306.)

(e) Set forth the policies and procedures instituted for public disclosure in accordance with § 104.141(f)(9); and

(Sec. 106(a)(9); 20 U.S.C. 2306.)

(f) Describe the procedures for insuring that funds for vocational programs for handicapped persons are used in a manner consistent with § 104.141(f)(10). The statement shall describe how the program provided each handicapped child will be planned and coordinated in conformity with and as a part of the child's individualized educational program as required by the Education of the Handicapped Act.

(Sec. 106(a)(10); 20 U.S.C. 2306.)

§ 104.183 Assessment of employment opportunities.

(a) The five-year State plan shall include an assessment of current and future needs for workers (job skills) within the State and, where appropriate, within the pertinent region of the country.

(b) This assessment shall reflect the latest available data of present and projected employment, including the data available from the State occupational information coordinating committee.

(Sec. 107(b)(1); 20 U.S.C. 2307.)

§ 104.184 Goals to meet employment needs.

The five-year State plan shall describe clearly the goals the State will seek to achieve with respect to its needs for workers identified in § 104.183 by the end of the five-year period covered by the five-year State plan. This description shall be in terms of the following four elements and shall include the reasons for choosing these elements:

(a) The programs (courses) and other training opportunities to be offered to meet the needs identified in § 104.183; (For the purposes of this part, the term "program" refers to OE instructional programs, as defined by the Office of Education in *Handbook VI, Standard Terminology for Curriculum and Instruction in Local and State School Systems* (1970), and means a planned sequence of courses, services, or activities designed to meet an occupational objective.)

(b) The projected enrollments of these programs and training opportunities;

(c) The allocations of responsibility for the offerings of those programs and training opportunities among the secondary, postsecondary, and adult levels of education and among the various types of institutions of the State; and

(d) The allocations of all local, State, and Federal financial resources available in the State for the programs and training opportunities among the secondary, postsecondary, and adult levels of education and among the various types of institutions of the State.

(Sec. 107(b)(2); 20 U.S.C. 2307.)

§ 104.185 Funding to meet employment needs.

(a) The five-year State plan shall set forth precisely the planned uses of Federal, State, and local education funds for each fiscal year of the State plan;

(b) The five-year State plan shall indicate how this allocation of funds will meet the goals identified in § 104.184;

(c) The description of the planned uses of funds shall be in terms of the four elements of § 104.184 (this does not require duplication of § 104.184(d));

(Sec. 107(b)(3)(A); 20 U.S.C. 2307.)

(d) The five-year State plan shall indicate the planned uses of funds under section 120(b)(1)(0) and section 130(b)(7) of this Act for:

(1) State administration;

(2) Local administration; and

(Implements Sec. 107(b)(3)(A); 20 U.S.C. 2307.)

(e) The five-year State plan shall set forth the reasons for choosing these particular uses of funds, except that the State will continue to use approximately the same amount of its State grant under subpart 2 (basic grant) of this part for programs in secondary schools during fiscal years 1978 and 1979 as it used during fiscal years 1975 and 1976, unless the State is able to demonstrate in its five-year State plan the need to shift funds from that use.

(Sec. 107(b)(3)(A); 20 U.S.C. 2307.)

§ 104.186 Funding to meet program (purpose) needs.

(a) The five-year State plan shall set forth precisely the intended uses of funds under the Act for:

(1) Basic grant programs in § 104.501;

(2) Program improvement and supportive services in § 104.701;

(3) Special programs for the disadvantaged in § 104.801 (funded under section 102(b) of the Act); and

(4) Consumer and homemaking education in § 104.901 (funded under section 102(c) of the Act).

(b) The five-year State plan shall set out the reasons for choosing the uses described in paragraph (a) of this section.

(c) The five-year State plan shall set forth precisely the intended uses of Federal funds, in accordance with the minimum percentages in §§ 104.312 and 104.313 to meet the special needs of:

(1) Handicapped persons;

(2) Disadvantaged persons; and

(3) Persons of limited English-speaking ability.

(d) The five-year State plan shall also set forth the intended allocation of State and local funds, in accordance with the matching requirements in § 104.303, to meet the special needs of:

(1) Handicapped persons;

(2) Disadvantaged persons; and

(3) Persons of limited English-speaking ability.

(Implements secs. 107(b)(3)(B), 110(a),(b); 20 U.S.C. 2307, 2310.)

§ 104.187 Policies for eradicating sex discrimination.

(a) The five-year State plan shall set forth a detailed description of policies and procedures which the State will follow to assure equal access to vocational education programs by both women and men.

This description shall include:

(1) Actions to be taken to overcome sex discrimination and sex stereotyping in all State and local vocational education programs;

(2) Incentive adopted by the State for eligible recipients to:

(i) Encourage the enrollment of both women and men in nontraditional courses of study; and

(ii) Develop model programs to reduce sex bias and sex stereotyping in training for and placement in all occupations.

(b) The five-year State plan shall set forth a program to assess and meet the needs of persons described in § 104.621. This program shall include:

(1) Special courses for these persons to learn how to seek employment; and

(2) Placement services for these persons once they complete the vocational education program.

(Sec. 107(b)(4); 20 U.S.C. 2307.)

§ 104.188 Coordination between manpower training programs and vocational education programs.

The five-year State plan shall describe the mechanism established for coordinating vocational education programs with manpower training programs conducted by prime sponsors under the Comprehensive Employment and Training Act (CETA), Pub. L. 93-203, and vocational education programs assisted under this Act. This description shall include the criteria developed to avoid duplication of programs under this Act and CETA.

(Sec. 107(b)(5); 20 U.S.C. 2307; Sen. Rept. 94-882; p. 68.)

DEVELOPMENT OF ANNUAL PROGRAM PLAN AND ACCOUNTABILITY REPORT

§ 104.202 Due date of annual program plan.

For each fiscal year, the annual program plan is due by the July 1st preceding the beginning of the applicable fiscal year. For example, the first annual program plan is required for fiscal year 1978 and is due in the appropriate HEW Regional Office by July 1, 1977.

(Sec. 108(b); 20 U.S.C. 2308.)

§ 104.203 Due date of annual accountability report.

For each fiscal year, the annual accountability report is due by the July 1st following the completion of the applicable fiscal year. For example, the first annual accountability report is required for fiscal year 1978 and is due in the appropriate HEW Regional Office by July 1, 1979.

(Sec. 108(b); 20 U.S.C. 2308.)

§ 104.204 Representation required in the development of the annual program plan and accountability report.

In formulating the annual program plan and accountability report for any given fiscal year, the State board is required to involve the active participation of a representative of each group set forth in § 104.162 (a) through (j).

(Secs. 107(a)(1), 108(a)(1); 20 U.S.C. 2307, 2308.)

§ 104.205 Meetings of participating representatives.

The State board shall convene, as a group, the representatives of the agencies, councils, and individuals specified in § 104.204 for at least three meetings during each fiscal year. These meetings will be convened to accomplish the following purposes:

(a) First meeting: To plan for the development of the first draft of the annual program plan and the accountability report;

(b) Second meeting: To consider the draft of the annual program plan and accountability report;

(c) Third meeting: To recommend for adoption the final annual program plan and accountability report.

(Sec. 108(a)(1); 20 U.S.C. 2308.)

§ 104.206 State board adoption of the annual program plan and accountability report.

(a) If the participating agencies, councils, and individuals are not able to agree upon the provisions of the annual program plan or the accountability report, the State board will make a final decision.

(b) The State board shall include in the annual program plan or, as appropriate, in the accountability report:

(1) Any recommendation which is rejected by the State board indicating its source (including the name of the individual and agency or council affiliation); and

(2) The reasons of the State board for rejecting the recommendation.

(Sec. 108(a)(1); 20 U.S.C. 2308.)

§ 104.207 Public hearing on the annual program plan and accountability report.

(a) In formulating the annual program plan and accountability report, the State board is required to conduct a public hearing. This public hearing shall be conducted:

(1) During the development, prior to adoption of the annual program plan and accountability report; and

(2) After giving sufficient public notice.

(b) The purpose of this public hearing is to provide an opportunity for all segments of the population of the State to give their views on:

(1) The goals which ought to be adopted in the annual program plan;

(2) The programs to be offered under the annual program plan;

(3) The allocation of responsibility for programs among the various levels of education and among the various institutions of the State; and

(4) The allocation of local, State, and Federal resources to meet these goals.

(Interprets Sec. 108(a)(2); 20 U.S.C. 2308.)

(c) The State board shall include in the annual program plan or, as appropriate, in the accountability report:

(1) The views expressed at the public hearing or comments submitted in writing;

(2) A description of how these views are reflected in the provisions of the annual program plan or the accountability report; and

(3) The reasons for rejecting any view which is not accepted for inclusion in the annual program plan or accountability report.

(Sec. 108(a)(2); 20 U.S.C. 2308.)

§ 104.221 Content of annual program plan for fiscal year 1978.

A five-year State plan which includes the program provisions in §§ 104.183 through 104.186 on a year-by-year basis will meet the requirements of the Act for the annual program plan, except that in addition to the planned uses of funds in § 104.186, the plan shall also set out precisely the proposed distribution of such funds among eligible recipients, together with an analysis of the manner in which such distribution complies with the assurance given in the general application and in accordance with the policies and procedures in § 104.182(d).

(Interprets 108(b)(1); 20 U.S.C. 2308.)

§ 104.222 Content of annual program plans for the fiscal years following 1978.

The plan shall contain: (a) Any updating of the five-year State plan, as submitted under §§ 104.183 and 104.184, considered necessary to reflect later or more accurate employment data or a different level of funding than was anticipated;

(b) A description of how the uses of funds proposed for the fiscal year in § 104.185 will be complied with or changed (in light of anticipated appropriations) and the reasons for the changes;

(c) A description of how the uses of funds under the Act proposed for the fiscal year in § 104.186 will be complied with or changed (in light of anticipated appropriations) and the reasons for the changes;

(d) A description of how funds used in (b) and (c) will comply with the minimum percentages, matching, and maintenance of effort requirements in § 104.301;

(e) The additional provisions set forth in § 104.221;

(f) The results of the:

(1) Coordination of programs funded under this Act and manpower training programs;

(2) Compliance of the State plan with the provisions contained in § 104.187 concerning providing equal access to programs by both men and women; and

(3) Participation of local advisory councils required to be established under § 104.171(e).

(Implements Sec. 108(b)(1); 20 U.S.C. 2308.)

§ 104.241 Content of the accountability report.

(a) The accountability report shall:

(1) Show the extent to which the State, during the fiscal year preceding the submission of the report, has achieved the goals of the approved five-year State plan, including a description in terms of the elements in § 104.184;

(2) Show the degree to which proposed uses of Federal, State, and local funds in § 104.222(b) have been complied with, including a description in terms of the elements in § 104.185;

(3) Show in detail how the funds used in § 104.222(d) complied with the minimum percentage, matching, and maintenance of effort requirements in § 104.301;

(Implements Sec. 108(b)(2)(A).)

(4) Show in detail how funds under the Act allocated for programs in § 104.186 have been used during the fiscal year, including:

(i) A description of uses of funds as set out in §§ 104.222(c);

(ii) A description of the distribution of funds available for these sections among local educational agencies and other eligible recipients in conformity with § 104.222(e); and

(iii) The results achieved by the uses of these funds.

(Sec. 108(b)(2)(B); 20 U.S.C. 2308.)

(b) The accountability report shall contain:

(1) A summary of the evaluation of programs conducted by the State in accordance with §§ 104.402 and 104.404; and

(2) A description of how the evaluation information has been used to improve the State's programs of vocational education, including consideration given to each recommendation in the evaluation report of the State advisory council for vocational education.

(Sec. 108(b)(2)(C); 20 U.S.C. 2308.)

APPROVAL OF FIVE-YEAR STATE PLAN AND ANNUAL PROGRAM PLAN AND ACCOUNTABILITY REPORT

§ 104.261 Conditions for approval of five-year State plan.

The Commissioner will not approve a five-year State plan until the Commissioner:

(a) Makes specific findings in writing as to the compliance of the five-year State plan with the provisions of the Act and applicable regulations;

(b) Makes a determination that adequate procedures are set forth, in accordance with § 104.182, to insure that assurances of the general application will be carried out;

(c) Makes a determination that adequate procedures are set forth in the five-year State plan to insure that the provisions of the plan will be carried out;

(Sec. 109(a)(1); 20 U.S.C. 2309.)

(d) Has received assurances that the full-time personnel assigned to review programs within the State to assure equal access by both men and women have been afforded the opportunity to review the five-year State plan; and

(Sec. 109(a)(3)(B); 20 U.S.C. 2309.)

(e) Makes a determination that the State has complied in preparing the five-year State plan with the nationally uniform definitions and information elements which have been developed under the authority of section 161 of the Act.

(Sec. 109(a)(3)(C); 20 U.S.C. 2309.)

§ 104.262 Conditions for approval of annual program plan and accountability report.

The Commissioner will not approve an annual program plan and accountability report until the Commissioner:

(a) Makes specific findings in writing as to the compliance of the annual program plan and accountability report with the provisions of the Act and applicable regulations;

(b) Makes a determination that adequate procedures are set forth to insure that the assurances of the general application will be carried out;

(c) Makes a determination that adequate procedures are set forth in the annual program plan and accountability report to insure that the provisions of the plan will be carried out;

(d) Makes a determination that the annual program plan and accountability report show progress in achieving the goals set forth in the approved five-year State plan;,

(Sec. 109(a)(2); 20 U.S.C. 2309.)

(e) Has received assurances that the full-time personnel assigned to review programs within the State to assure equal access by both men and women have been afforded the opportunity to review the annual program plan and accountability report; and

(Sec. 109(a)(3)(B); 20 U.S.C. 2309.)

(f) Makes a determination that the State has complied in preparing the annual program plan and accountability report with the nationally uniform definitions and information elements which have been developed under the authority of section 161 of the Act.

(Sec. 109(a)(3)(C); 20 U.S.C. 2309.)

§ 104.263 Notice of approval or disapproval.

After reviewing the five-year State plan, the annual program plan, and the accountability report, the Commissioner will notify the State board, in writing, of the granting or withholding of approval.

(Sec. 109 (a), (b); 20 U.S.C. 2309.)

WITHHOLDING OF APPROVAL OF PLAN

§ 104.271 Disapproval of plan.

The Commissioner:

(a) Will not finally disapprove a State plan without first affording the State

board reasonable notice and opportunity for a hearing;

(Sec. 109(b)(1); 20 U.S.C. 2309.)

(b) Will not disapprove a State plan solely on the basis of the distribution of State and local expenditures for vocational education;

(Sec. 109(b)(2); 20 U.S.C. 2309.)

(c) Will give at least fifteen (15) work days written notice of the disapproval of a plan or disapproval of the method by which the State is administering the plan; and

(Implements Sec. 109(c); 20 U.S.C. 2309.)

(d) Will hold the hearing within the State.

(Sec. 109(b)(1); 20 U.S.C. 2309.)

HEARINGS BEFORE THE COMMISSIONER ON AGENCY OR COUNCIL CHALLENGES TO THE FIVE-YEAR STATE PLAN OR THE ANNUAL PROGRAM PLAN

§ 104.281 Opportunity for a hearing.

(a) Sections 107 and 108 of the Act require the Commissioner to provide an opportunity for a hearing to certain agencies and councils which may be dissatisfied with any final decision of the State board with respect to the proposed five-year State plan or the annual program plan filed with the Commissioner.

(b) The agencies and councils which may request a hearing are those agencies and councils set forth in § 104.162 (a) through (d), and (h) through (j)). A representative of an agency or council may not request a hearing in his or her individual capacity.

(Secs. 107(a), 108(a); 20 U.S.C. 2307; 2308.)

(c) An agency or council may appeal to the Commissioner only:

(1) Matters which the agency or council has recommended to the State board for inclusion in the five-year State plan or annual program plan which the State board has not accepted (§ 104.164); or

(2) The State board's failure to follow the section 107 and section 108 process as to that agency or council.

(Interprets Sec. 107(a), 108(a), 20 U.S.C. 2307, 2308.)

§ 104.282 Appeal to the Commissioner.

(a) If a hearing is to be requested, the notice of appeal shall be in writing, addressed to the Commissioner and to the State board, and mailed by registered mail no later than fifteen (15) work days after the notification in writing has been received by the agency or council that the recommendations of the agency or council have been disapproved by the State board.

(b) Pending resolution of the matter for which a hearing has been requested, the five-year State plan or annual program plan submitted by the State board, if in substantially approvable form, may be conditionally approved by the Commissioner and may be conditionally deemed the operative plan.

(Implements Secs. 107(a), 108(a); 20 U.S.C. 2307, 2308.)

§ 104.283 Hearing.

(a) The Commissioner may delegate authority to an employee of the Office of Education to be the hearing officer. The hearing officer shall take testimony, consider the arguments of the parties, make findings of fact, make conclusions of law, and make recommendations to the Commissioner.

(b) The hearing officer shall give each party at least fifteen (15) work days notice of the time, place, and purpose of the hearing.

(c) The fifteen (15) work days notice of time and place of the hearing may be reduced or waived if all parties agree.

(d) The hearing may take place in Washington, D.C., or within the State whose agency or council is appealing, at the option of the requesting party and with the hearing officer's approval.

(e) The hearing officer may adjourn the hearing to a more satisfactory time or place on the motion of the hearing officer or on motion of a party.

(f) A record shall be kept of the hearing. The record may be taken by shorthand, stenotype, or mechanical or electrical means, and shall be transcribed.

(Implements Sec. 107(a)(1); 20 U.S.C. 2307.)

§ 104.284 Prehearing.

(a) The hearing officer may require a prehearing conference.

(b) The prehearing conference shall be conducted in an informal manner for the purpose of:

(1) Simplification of the issues;

(2) Exchange of documents;

(3) Stipulation of facts;

(4) Deciding on procedures at the hearing; and

(5) Such other matters as may properly be dealt with to aid in expediting the orderly conduct or disposition of the hearing.

(Implements Sec. 107(a)(1); 20 U.S.C. 2307.)

§ 104.285 Right to counsel, witnesses, cross examination.

(a) The parties shall have the right to be represented by counsel.

(b) The parties may offer evidence by witnesses appearing in person.

(c) Where a witness appears in person, the other party shall have the right to cross examine the witness.

(d) If a witness is unable to appear in person, documentary evidence or affidavits may be accepted in lieu of personal appearance. Affidavits shall be given only the probative value of a sworn statement which has not been subjected to cross examination.

(Implements Sec. 107(a)(1); 20 U.S.C. 2307.)

§ 104.286 Evidence and standard of evidence.

(a) Formal rules of evidence do not apply. The hearing officer shall restrict the admission of evidence to that which is material and relevant.

(b) The hearing officer may request additional evidence.

(c) Findings of fact shall be supported by substantial evidence. "Substantial evidence," for the purpose of this hearing, means such relevant evidence as a reasonable mind might accept to support a conclusion. (305 U.S. 197, 229 (1938).)

(Implements Sec. 107(a)(1); 20 U.S.C. 2307.)

§ 104.287 Determinations to be made by the hearing officer.

(a) The hearing officer shall determine, with reference to the matters subject to appeal (§ 104.218(c)):

(1) Whether the procedural requirements of the Act have been fulfilled;

(2) Whether the decisions of the State board as set forth in the five-year State plan or the annual program plan are in accordance with the law;

(3) Whether the decisions of the State board in the five-year State plan or the annual program plan are based on substantial evidence; and

(4) Whether the State board's decisions in the five-year State plan or the annual program plan best carry out the purposes of the Act.

(Sec. 107(a)(1); 20 U.S.C. 2307.)

(b) Where the hearing officer decides that the State board has conformed with the provisions of paragraphs (a), (1), (2), and (3) of this section the hearing officer shall issue findings of fact to that effect.

(c) Where the hearing officer decides that the five-year State plan or the annual program plan will best carry out the purposes of the Act, the hearing officer shall recommend a finding for the State board.

(d) Where the hearing officer decides that the State board has not conformed with the provisions of paragraphs (a)(1), (2), and (3) of this Section or that the five-year State plan or the annual program plan will not best carry out the purposes of the Act, the hearing officer shall recommend that the plan not be approved.

(Implements Sec. 107(a)(1); 20 U.S.C. 2307.)

§ 104.288 Commissioner's decision.

(a) The findings of fact and recommendation of the hearing officer shall be conveyed to the parties and to the Commissioner.

(b) The findings and recommendation of the hearing officer shall become the findings and decision of the Commissioner unless the Commissioner reverses the hearing officer's findings or recommendation, in whole or in part, within fifteen (15) work days after the date the hearing officer conveys his or her findings and recommendation to the Commissioner.

(Implements Sec. 107(a)(1); 20 U.S.C. 2307.)

(c) The Commissioner may not unilaterally change a five-year State plan or annual program plan. The Commissioner shall approve a plan or disapprove a plan in its entirety and return it to the State board for revision.

(Implements Sec. 107(a)(1); 20 U.S.C. 2307; Conf. Rept. No. 94-1701, pp. 216, 217.)

§ 101.289 Appeal by State board, or agency to the court of appeals.

A State board, or agency dissatisfied with a final action of the Commissioner

under section 107(a)(1) of the Act may appeal to the United States court of appeals for the circuit in which the State is located in accordance with the procedure specified in section 434(d)(2) of GEPA.

(Implements Sec. 107(a)(1); 20 U.S.C. 1232c).

SUSPENSION AND TERMINATION OF PAYMENTS FOR NONCOMPLIANCE

§ 104.291 Suspension and termination of payments for noncompliance.

Suspension and termination of payments for noncompliance shall be in accord with section 434(c) of GEPA. Section 434(c) of GEPA reads as follows:

(c) Whenever the Commissioner, after reasonable notice and an opportunity for hearing, finds that there has been failure, by any recipient of funds under any applicable program, to comply substantially with terms to which such recipient has agreed in order to receive such funds, the Commissioner shall notify such recipient that further payments will not be made to such recipient under that program until he is satisfied that such recipient no longer fails to comply with such terms. Until the Commissioner is so satisfied, no further payments shall be made to such recipient. Pending the outcome of any termination proceeding initiated under this paragraph, the Commissioner may suspend payments to such recipient, after such recipient has been given reasonable notice and opportunity to show cause why such action should not be taken.

(Sec. 109(f)(1); 20 U.S.C. 2309,, 1232c.)

APPEAL TO THE COURTS

§ 104.292 Appeal by State board on withholding of approval of State plan.

A State board which is dissatisfied with the final action of the Commissioner after an appeal to the Commissioner on withholding of approval of a State plan may appeal to the appropriate United States court of appeals as provided in section 109(d) of the Act.

(Sec. 109(d); 20 U.S.C. 2309.)

§ 104.293 Appeal by eligible recipients to the court of appeals.

An eligible recipient dissatisfied with the final action of the State board (or other appropriate State administrative agency) with respect to approval of an application by such eligible recipient for a grant under this Act may appeal to the appropriate United States court of appeals as provided in section 109(e) of the Act.

(Sec. 109(e); 20 U.S.C. 2309.)

FISCAL REQUIREMENTS

FEDERAL SHARE

§ 104.301 Application of Federal requirements.

(a) Federal vocational education funds shall be used solely to carry out the purposes of the Vocational Education Act and the regulations in this part. All expenditures of Federal funds are subject to the conditions and requirements of the Act and regulations.

(Interprets Sec. 111(a); 20 U.S.C. 2311.)

(b) Federal funds shall be used to share only in expenditures which are made in accordance with: (1) Assurances of the general application; (2) Five-year State plan; and (3) Annual program plan.

(Interprets Sec. 111(a); 20 U.S.C. 2311.)

(c) State and local funds which are applied to the matching requirements and maintenance of efforts requirements of the Act are subject to the conditions and requirements of the Act, regulations, and five-year State plan and annual program plan. This means that every program or activity supported in whole or in part by State or local funds which are used to match Federal funds must meet the same conditions and requirements as those supported by Federal funds.

(Interprets Sec. 111(a); 20 U.S.C. 2311; 20 U.S.C. 19.)

(d) Only actual expenditures of State and local funds shall be accepted as part of the State's matching and maintenance of effort requirements. This means that in-kind contributions shall not be used as part of the State's matching and maintenance of effort requirements. Requirements of 45 CFR 100b.92(b) of GEPR shall not apply to this program.

(Interprets Sec. 111(a); 20 U.S.C. 2311, 20 U.S.C. 19.)

§ 104.302 Federal share of expenditures—annual program plan.

(a) The Commissioner will pay to each State from the funds available under Section 102(a) an amount not to exceed 50 percent of the cost of carrying out its annual program plan.

(b) The State's matching share of expenditures under the annual program plan may be on a state-wide basis.

(c) Except for the fiscal requirements for the national priority programs described in § 104.303, State administration described in § 104.306, and local administration described in § 104.307, it is not necessary that Federal funds be matched by non-Federal funds for each purpose and program under the Act.

(Interprets Sec. 111(a); 20 U.S.C. 2311.)

§ 104.303 Federal share of expenditures—national priority programs.

(a) The Commissioner will pay to each State an amount not to exceed 50 percent of the excess cost (i.e., costs of special educational and related services above the costs for non-handicapped students) of programs, services, and activities under the basic grant in subpart 2 and program improvement and supportive services in subpart 3 for handicapped persons.

(b) The Commissioner will pay to each State an amount not to exceed 50 percent of:

(1) The excess cost (i.e., costs of special educational and related services above the costs for non-disadvantaged persons) of programs, services, and activities under the basic grant in subpart 2 and program improvement and supportive services in subpart 3 for disadvantaged persons (other than handicapped persons);

(2) The excess cost (i.e., costs of special education and related services above the costs for persons who are not classified as persons of "limited English-speaking ability") of programs, services, and activities under the basic grant in subpart 2 and program improvement and supportive services in subpart 3 for persons who have limited English-speaking ability; and

(3) Stipends for students entering or already enrolled in vocational education programs who have acute economic needs which cannot be met under work-study programs.

(c) The Commissioner will pay to each State an amount not to exceed 50 percent of the cost of programs, services, and activities under the basic grant in subpart 2 and program improvement and supportive services in subpart 3 for:

(1) Postsecondary programs for: (i) Persons who have completed or left high school; (ii) who are enrolled in organized programs of study for which credit is given toward and associate or other degree; and (iii) who are not enrolled in programs designed as baccalaureate or higher degree programs; and

(2) Adult programs for: (i) Persons who have already entered the labor market; (ii) persons who are unemployed; or (iii) persons who have completed or left high school and who are enrolled in organized programs of study for which credit is not given toward an associate or other degree.

(Sec. 110; 20 U.S.C. 2310.)

§ 104.304 Allowable expenditures for vocational education for national priority programs.

A State shall use the funds allotted for national priority programs under section 110 of the Act only for expenditures which are attributable to vocational education programs, services, and activities described in § 104.303.

(Section 110; 20 U.S.C. 2310; 45 CFR 100, App. B, Part II.)

§ 104.305 Federal share of expenditures—100 percent payments.

(a) The Commissioner will pay to each State an amount up to 100 percent of the cost of:

(1) Cooperative vocational education programs which include students enrolled in nonprofit private schools pursuant to section 122(f) of the Act;

(2) Exemplary and innovative programs which include students enrolled in nonprofit private schools pursuant to section 132(b) of the Act; and

(3) Special programs for disadvantaged persons in areas of the State which have high concentrations of youth unemployment or school dropouts under section 140 of the Act.

(b) The Commissioner will pay to the Trust Territory of the Pacific Islands, the Northern Mariana Islands, Guam,

the Virgin Islands, and American Samoa up to 100 percent of the cost of carrying out all programs listed in §§ 104.302 and 104.303.

(Sec. 111(a)(1); 20 U.S.C. 2311.)

§ 104.306 Federal share of expenditures—State administration.

(a) The Commissioner will pay, from the funds allotted pursuant to section 102(a) of the Act, up to 50 percent of the cost of administration of the five-year State plan and annual program plan, except as indicated in paragraphs (b) and (c).

(Sec. 111(a)(2)(B); 20 U.S.C. 231.)

(b) The Federal share of the cost of administration of the five-year State plan and annual program plan in fiscal year 1978 is up to 80 percent and in fiscal year 1979 is up to 60 percent.

(Sec. 111(a)(2)(B); 20 U.S.C. 2311.)

(c) The Federal share of the cost of administration of the five-year State plan and annual program plan in fiscal year 1978 may be in excess of 80 percent under the following conditions:

(1) State and local expenditures for vocational education in a State for the latest fiscal year for which reliable data are available preceding fiscal year 1978 exceed the Federal expenditures for vocational education in that State by ten times. For example, if the Federal allocation in fiscal year 1977 is $2 million, the aggregate of State and local expenditures must be greater than $20 million; and

(2) The Commissioner determines that the costs of administration of the five-year State plan and annual program plan in fiscal year 1977 were necessary for the proper and efficient performance of the State's duties under the Act; and

(3) The Commissioner determines that the 80 percent ceiling on the Federal share of the cost of administration is insufficient to meet the needs of the State.

(d) The State shall use the following computation in determining its expenditure of Federal funds under paragraph (a) for administration of the five-year plan and annual program plan:

(1) not more than 80 percent of the total amount used for State administration shall be made from the basic grant in subpart 2;

(2) not more than 20 percent of the total amount used for State administration shall be made from program improvement and supportive services in subpart 3.

(e) The computation in paragraph (d) of this section does not require the State to use administrative funds in an 80/20 ratio between subpart 2 and subpart 3 activities. The State may use its administrative funds in whatever distribution best meets its needs.

(Interprets Sec. 111(a)(2)(B); 20 U.S.C. 2311.)

§ 104.307 Federal share of expenditures—local administration.

(a) The Commissioner will pay, from the funds allotted pursuant to section 102(a) of the Act, a part of the costs of supervision and administration of vocational education programs carried out by an eligible recipient.

(b) The eligible recipient shall use either the method set forth in subparagraph (1) or subparagraph (2) of this paragraph in determining the payment of local administrative costs.

(1) The percentage of Federal funds used by an eligible recipient for the costs of supervision and administration of vocational education programs may be no greater than the percentage of Federal funds used to support the total vocational education program carried out by the eligible recipient. For example, the total cost of the vocational education program of the eligible recipient is $100,000 and the Federal contribution to this eligible recipient is $25,000, or 25 percent of the total. If local administrative costs are $10,000, then up to 25 percent of this amount, or $2,500, may be charged against the Federal funds.

(2) Up to 50 percent of the cost of supervision and administration of the vocational education program of the eligible recipient may be charged to the Federal funds: *Provided*, That State funds match the Federal funds dollar for dollar. State funds used to match Federal funds shall be specifically made available for the purpose of local administration. For example, if the total cost of local administration is $10,000, then up to $5,000 may be charged to the Federal funds as long as the State contributes the same amount from a specific State appropriation.

(c) The State shall use the following computation in determining the amount of Federal funds available for the costs of local supervision and administration:

(1) Not more than 80 percent of the total amount used for supervision and administration by eligible recipients shall be made from the basic grant in subpart 2.

(2) Not more than 20 percent of the total amount used for supervision and administration by eligible recipients shall be made from program improvement and supportive services in subpart 3.

(d) The computation in paragraph (c) of this section does not require the State to use administrative funds in an 80/20 ratio between subpart 2 and subpart 3 activities. The State may use its administrative funds in whatever proportion best meets its needs.

(Interprets Sec. 111(a); 20 U.S.C. 2311.)

MINIMUM PERCENTAGES

§ 104.311 Percentage requirements with respect to State distribution of Federal funds.

The minimum percentages set forth in §§ 104.312, 104.313, and 104.314 are applicable to each State's allotment under section 102(a) of the Act.

(Interprets Sec. 110(a); 20 U.S.C. 2310.)

§ 104.312 Minimum percentage for the handicapped.

The State shall expend at least 10 percent of the allotment under section 102(a) of the Act for vocational education for handicapped persons as described in § 104.303(a). The State shall use these funds to the maximum extent possible to assist handicapped persons to participate in regular vocational education programs.

(Sec. 110(a); 20 U.S.C. 2310.)

§ 104.313 Minimum percentage for the disadvantaged.

(a) The State shall expend at least 20 percent of the section 102(a) allotment, subject to the conditions of paragraph (b), for the following purposes:

(1) Vocational education for disadvantaged persons (other than handicapped persons) as described in § 104.303(b)(1);

(2) Vocational education for persons who have limited English-speaking ability as described in § 104.303((b)(2); and

(3) Stipends for students entering or already enrolled in vocational education programs who have acute economic needs which cannot be met under work-study programs.

(Sec. 110(b); 20 U.S.C. 2310.)

(b) The State shall use, to the maximum extent possible, the funds expended for disadvantaged persons and persons of limited English-speaking ability to enable these persons to participate in regular vocational education programs.

(Sec. 110(d); 20 U.S.C. 2310.)

(c) The State shall use the following formula in determining its expenditures of funds under paragraph (a) of this section for vocational education for persons who have limited English-speaking ability:

(1) First determine the amount of Federal funds reserved for the purposes of paragraph (a) of this section;

(2) Determine the population having limited English-speaking ability who are between the ages of 15 and 24 inclusively;

(3) Determine the total population of the State aged 15 to 24 inclusively;

(4) Divide step two by step three;

(5) Multiply the quotient from step four by the total amount reserved for paragraph (a) of this section as indicated in step one;

(6) Expend at least this amount for vocational education for persons having limited English-speaking ability. The amount expended for this purpose shall not exceed the total amount reserved for paragraph (a) of this section.

For example, a State reserves $500,000 for the purposes of paragraph (a) of this section. The State determines its limited English-speaking population between the ages of 15 and 24 is 10,000. The total population of the State aged 15 to 24 is 200,000. 10,000 is divided by 200,000 and the quotient is .05. $500,000 is multiplied by .05 and the product is $25,000. Accord-

ingly, the State expends at least $25,000 for vocational education for persons who have limited-English speaking ability, but no more than $500,000.

(Implements Sec. 110(b)(2); 20 U.S.C. 2310.)

§ 104.314 Minimum percentage for postsecondary and adult.

The State shall expend at least 15 percent of the section 102(a) allotment for vocational education for:

(a) Postsecondary programs for: (1) Persons who have completed or left high school; (2) Who are enrolled in organized programs of study for which credit is given toward an associate or other degree; and (3) Who are not enrolled in programs designed as baccalaureate or higher degree programs; and

(b) Adult programs for: (1) Persons who have already entered the labor market; (2) Persons who are unemployed; or (3) Persons who have completed or left high school and who are enrolled in organized programs of study for which credit is not given toward an associate or other degree.

(Sec. 110(c); 20 U.S.C. 2310.)

§ 104.315 Expenditures for programs in secondary schools.

(a) The State shall expend from its allotment for the basic grant (subpart 2) approximately the same amount of Federal funds for programs in secondary schools during fiscal years 1978 and 1979 as it had expended during fiscal years 1975 and 1976.

(b) The State shall set forth in the five-year State plan its justification for the need to shift funds in the event the projected Federal expenditures for programs in secondary schools, in either fiscal year 1978 or 1979 are not within 95 percent of the amount of Federal funds expended for programs in secondary schools during fiscal years 1975 and 1976.

(Interprets Sec. 107(b)(3)(A); 20 U.S.C. 2307.)

MAINTENANCE OF EFFORT

§ 104.321 Maintenance of fiscal effort at the State level.

A State shall maintain its fiscal effort on either a per student basis or on an aggregate basis for vocational education compared to the amount expended in the previous year.

(Sec. 111(b)(1); 20 U.S.C. 2311.)

§ 104.322 Withholding of payments.

The Commissioner will not make any payments to a State in a fiscal year unless the Commissioner finds that the fiscal effort of the State for vocational education on a per student basis or on an aggregate basis in the previous fiscal year was not less than the fiscal effort of the State on a per student basis or on an aggregate basis in the second preceding fiscal year.

(Sec. 111(b)(1); 20 U.S.C. 2311.)

§ 104.323 Five percent rule.

Total State fiscal effort for vocational education in the preceding fiscal year shall not be considered reduced from the fiscal year effort of the second preceding fiscal year unless the per student expenditure or aggregate expenditure in the preceding year is less than that in the second preceding fiscal year by more than five percent. For example, a State which expends an aggregate of $10 million for vocational education in one fiscal year and an aggregate of $9,600,000 in the succeeding fiscal year will not be considered to have reduced fiscal effort for the purposes of the Vocational Education Act.

(Interprets Sec. 111(b)(1); 20 U.S.C. 2311.)

§ 104.324 Unusual circumstance rule.

Any reduction in fiscal effort for any fiscal year by more than five percent will disqualify the State from receiving Federal funds unless the State is able to demonstrate to the satisfaction of the Commissioner the following:

(a) In the preceding fiscal year, the reduction was occasioned by unusual circumstances that could not have been fully anticipated or reasonably compensated for by the State. Unusual circumstances may include unforeseen decreases in revenues due to the decline of the tax base;

(b) In the second preceding fiscal year, contributions of large sums of monies from outside sources were made; or

(c) In the second preceding fiscal year, large amounts of funds were expended for long-term purposes such as construction and acquisition of school facilities or the acquisition of capital equipment.

(Interprets Sec. 111(b)(1); 20 U.S.C. 2311.)

§ 104.325 Maintenance of fiscal effort at the local level.

A local educational agency shall maintain its fiscal effort on either a per student basis or on an aggregate basis for vocational education compared with the amount expended in the previous fiscal year.

(Sec. 111(b)(1); 20 U.S.C. 2311.)

§ 104.326 Withholding of payments.

A State shall not make payment under this Act to a local educational agency unless the State finds that the combined fiscal effort of the State and local educational agency on a per student basis or on an aggregate basis of the local educational agency and the State, was not less than the combined fiscal effort in the second preceding fiscal year.

(Sec. 111(b)(1); 20 U.S.C. 2311.)

§ 104.327 Exceptions.

The 5 percent rule applicable to the State in § 104.323 and the unusual circumstances rule in § 104.324 are also applicable to local educational agencies.

(Interprets Sec. 111(b)(1); 20 U.S.C. 2311.)

§ 104.328 Maintenance of fiscal effort by postsecondary educational institutions.

A postsecondary educational institution shall maintain its fiscal effort on either a per student basis or on an aggregate basis for vocational education compared with the amount expended in the previous fiscal year.

(Sec. 111(b)(2); 20 U.S.C. 2311.)

§ 104.329 Withholding of payments.

A State shall not make any payment under this Act to a postsecondary educational institution unless the State finds that the fiscal effort on a per student basis or on an aggregate basis of that institution, with respect to the provision of vocational education, was not less than the fiscal effort of that institution in the second preceding fiscal year.

(Sec. 111(b)(2); 20 U.S.C. 2311.)

§ 104.330 Exceptions.

The 5 percent rule applicable to the State in § 104.323 and the unusual circumstances rule in § 104.324 are also applicable to postsecondary educational institutions.

(Interprets Sec. 111(b)(2); 20 U.S.C. 2311.)

STATE EVALUATION

§ 104.401 Purpose.

The State evaluations are to be used to assist local educational agencies and other recipients of funds in operating the best possible programs of vocational education and to improve the State's programs of vocational education.

(Sec. 112(b)(1); 20 U.S.C. 2312.)

§ 104.402 Evaluation by State board.

The State board shall, during the five-year period of the State plan, evaluate in quantitative terms the effectiveness of each formally organized program or project supported by Federal, State, and local funds. These evaluations shall be in terms of: (a) Planning and operational processes, such as:

(1) Quality and availability of instructional offerings;

(2) Guidance, counseling, and placement and follow-up services;

(3) Capacity and condition of facilities and equipment;

(4) Employer participation in cooperative programs of vocational education;

(5) Teacher/pupil ratios; and

(6) Teacher qualifications.

(b) Results of student achievement as measured, for example, by:

(1) Standard occupational proficiency measures;

(2) Criterion referenced tests; and

(3) Other examinations of students' skills, knowledge, attitudes, and readiness for entering employment successfully.

(c) Results of student employment success as measured, for example, by:

(1) Rates of employment and unemployment;

(2) Wage rates;

(3) Duration of employment; and

(4) Employer satisfaction with performance of vocational education students as compared with performance of persons who have not had vocational education.

(d) The results of additional services, as measured by the suggested criteria un-

der paragraphs (a), (b), and (c) of this section, that the State provides under the Act to these special populations:

(1) Women;
(2) Members of minority groups;
(3) Handicapped persons;
(4) Disadvantaged persons; and
(5) Persons of limited English-speaking ability.

(Implements Sec. 112(b)(1); 20 U.S.C. 2312.)

§ 104.403 Use of results of evaluation.

(a) The results of the evaluation shall be used as a basis to revise and improve the programs conducted under the approved five-year State plan.

(b) The State board shall make the results of the evaluations readily available to the State advisory council on vocational education.

(Sec. 112(b)(1)(A); 20 U.S.C. 2312.)

§ 104.404 Special data on completers and leavers.

(a) The State shall evaluate, using wherever possible statistically valid sampling techniques, the effectiveness of each program of vocational education which purports to teach entry-level job skills.

(b) The State shall evaluate each of these programs in order to ascertain the extent to which both those students who complete a program and those students who leave before completing a program:

(1) Find employment in occupations related to their training; and

(2) Are considered by their employers to be well-trained and prepared for employment.

(Sec. 112(b)(1)(B); 20 U.S.C. 2312.)

(c) The State shall use the following definitions for "program completer" and "program leaver":

(1) "Program completer" means a student who finishes a planned sequence of courses, services, or activities designed to meet an occupational objective and which purports to teach entry-level job skills; and

(2) "Program leaver" means a student who has been enrolled in and has attended a program of vocational education (which is part of a planned sequence of courses, services or activities designed to meet an occupational objective and which purports to teach entry-level job skills) and has left the program without completing it, except that no student shall be counted as a program leaver who is still enrolled in another program of vocational education. The term "program leaver" includes:

(i) Persons who leave the program voluntarily before its formal completion because they have acquired sufficient entry-level job skills to work in the field, and who have taken a job related to their field of training; and

(ii) All other leavers.

(d) For the purposes of this section, a State shall report separately on program completers and program leavers in accordance with the survey instructions and sampling standards to be provided by the National Center for Educational Statistics, HEW, as follows:

(1) Those who secure employment in the occupation for which they were trained or in occupations related to their vocational training, including the military;

(2) Those in paragraph (d)(1) of this section considered by their employers to be well trained and prepared for employment;

(Secs. 112(b)(1)(B), 161(a)(3)(B); 20 U.S.C. 2312, 2391.)

(3) Those who are enrolled for additional education and training; and

(4) Those in none of the above categories.

(Implements Secs. 112(b)(1)(B), 161(a)(3)(B); 20 U.S.C. 2312, 2391.)

(e) Persons who are enrolled for additional education and training shall not be counted as "leavers" in the evaluation data.

(Secs. 112(b)(1)(B), 161(a)(3)(B); 20 U.S.C. 2312, 2391.)

(f) The evaluation data on completers and leavers shall be collected at a date to be specified by the National Center for Educational Statistics, HEW.

(Implements Secs. 112(b)(1)(B), 161(a)(3)(B); 20 U.S.C. 2312, 2391.)

§ 104.405 Assurance of compatible data.

In order to assure that the data on program completers and leavers are compatible and can be aggregated and reported for all of the States, each State shall utilize in its data collection and reporting the information elements and uniform definitions which are developed for the national vocational education data reporting and accounting system, as required by section 161 of the Act.

(Sec. 161(a)(3)(B); 20 U.S.C. 2391.)

Subpart 2—Basic Grant

General Purposes

§ 104.501 Authorization of grants.

A State shall use its basic grant, which is equal to 80 percent of the funds allotted pursuant to section 102(a) of the Act, for the purposes set forth in § 104.502.

(Secs. 103(e), 120(a); 20 U.S.C. 2303, 2330.)

§ 104.502 Use of funds under the basic grant.

(a) The State shall expend not less than $50,000 for each fiscal year from the funds available under the basic grant (section 120 of the Act) for the support of full-time personnel to perform the functions set forth in §§ 104.71 through 104.76.

(Sec. 104(b), 120(b)(1)(F); 20 U.S.C. 2304, 2330.)

(b) The State shall expend not less than an amount of funds it deems necessary for each fiscal year from the funds available under the basic grant (section 120 of the Act) for special programs and placement services which are tailored to meet the needs of the group identified in § 104.621. The scope of these vocational education programs is described in § 104.622.

(Sec. 107(b)(4)(B); 20 U.S.C. 2307.)

(c) The State may use the balance of the funds available under the basic grant (section 120 of the Act), in accordance with the approved five-year State plan and annual program plan, for any of the following purposes:

(1) Vocational education programs, described in § 104.511;

(2) Work-study programs, described in § 104.521;

(3) Cooperative vocational education programs, described in § 104.531;

(4) Energy education programs, described in § 104.541;

(5) Construction of area vocational education school facilities, described in § 104.551;

(6) Provision of stipends, described in § 104.571;

(7) Placement services for students who have successfully completed vocational education programs, described in § 104.581;

(8) Industrial arts programs, described in § 104.591;

(9) Support services for women, described in § 104.611;

(10) Day care services for children of students in secondary and postsecondary vocational education programs, described in § 104.611; and

(11) Construction and operation of residential vocational schools, described in § 104.631.

(12) Provision of vocational training through arrangements with private vocational training institutions or other existing institutions capable of carrying out vocational education programs, described in § 104.514;

(13) State administration of the five-year State plan and annual program plan, described in § 104.306; and

(14) Local supervision and administration of vocational education programs, services, and activities, described in § 104.307.

(Sec. 120(b); 20 U.S.C. 2330.)

Vocational Education Programs

§ 104.511 Use of funds.

(a) A State may use funds under its basic grant (section 120 of the Act) for vocational education programs which are described in its approved five-year State plan and annual program plan.

(b) Vocational education programs mean "organized educational programs which are directly related to the preparation of individuals for paid or unpaid employment, or for additional preparation (upgrading and retraining) for a career requiring other than a baccalaureate or advanced degree, and, for the purpose of this paragraph, the term 'organized education program' means only instruction related to the occupation or occupations for which the students are in training or instruction necessary for students to benefit from such training, and the acquisition, maintenance, and repair of instructional supplies, teaching aids, and equipment, and the term 'vocational education' does not mean the

construction, acquisition or initial equipment of buildings, or the acquisition of rental of land."

(Secs. 120(b)(1)(A), 195(1); 20 U.S.C. 2330, 2461.)

§ 104.512 Vocational instruction.

(a) For the purposes of these regulations, vocational instruction means instruction which is designed upon its completion to prepare individuals for employment in a specific occupation or a cluster of closely related occupations in an occupational field, and which is especially and particularly suited to the needs of those engaged in or preparing to engage in such occupation or occupations.

(b) Vocational instruction may include:

(1) Classroom instruction;

(2) Shop, laboratory, and classroom related field work;

(3) Programs providing occupational work experience, and related instructional aspects of apprenticeship programs subject to the provisions of § 104.515;

(4) Remedial programs which are designed to enable individuals, including persons of limited-English speaking ability, to profit from instruction related to the occupation or occupations for which they are being trained by correcting whatever educational deficiencies or handicaps prevent them from benefiting from such instruction; and

(5) Activities of vocational student organizations which are an integral part of the vocational instruction, subject to the provisions in § 104.513.

(c) Vocational instruction may be provided to either:

(1) Those preparing to enter an occupation upon the completion of the instruction; or

(2) Those who have already entered an occupation but desire to upgrade or update their occupational skills and knowledge in order to achieve stability or advancement in employment.

(Implements Sec. 120(b)(1)(A); 20 U.S.C. 2330.)

§ 104.513 Activities of vocational education student organizations.

(a) A State may use funds under its basic grant to support activities of vocational education student organizations which are described in its approved five-year State plan and annual program plan and which are:

(1) An integral part of the vocational instruction offered;

(2) Supervised by vocational education personnel who are qualified in the occupational area which the student organization represents; and

(3) Available to all students in the instructional program without regard to membership in any student organization.

(b) An integral part of vocational instruction includes:

(1) Training in an organized educational program which is directly related to the preparation of individuals for paid or unpaid employment in a career requiring other than a baccalaureate or higher degree; or

(2) Field or laboratory work incident to the vocational training; or

(3) Development and acquisition of instructional materials, supplies, and equipment for instructional services.

(c) An integral part of vocational instruction does not include:

(1) Lodging, feeding, conveying, or furnishing transportation to conventions or other forms of social assemblage;

(2) Purchase of supplies, jackets, and other effects for students' personal ownership;

(3) Cost of non-instructional activities such as athletic, social, or recreational events;

(4) Printing and disseminating non-instructional newsletters;

(5) Purchase of awards for recognition of students, advisors, and other individuals; or

(6) Payment of membership dues.

(Implements Sec. 120(b)(1); 20 U.S.C. 2330; 31 U.S.C. 551.)

§ 104.514 Vocational instruction under contract.

(a) A State may make provision for any portion of the program of instruction on an individual or group basis by private (for profit or non-profit) vocational training institutions (subject to the requirements of paragraph (c) of this section) or other existing institutions capable of carrying out vocational programs through a written contract with the State board or local educational agency. The contract shall describe the portion of instruction to be provided by the institution and incorporate the standards and requirements of vocational instruction set forth in the regulations in this subpart and the approved five-year State plan.

(b) The contract for instruction shall be entered into only upon a determination by the State board or local educational agency that:

(1) The contract is in accordance with State and local law; and

(2) The instruction to be provided under contract will be conducted as a part of the vocational education program of the State and will constitute a reasonable and prudent use of funds available under the approved five-year State plan.

(c) The State board or local education agency may make arrangements with private (for profit or non-profit) vocational training institutions for the provision of vocational education where the State board or local educational agency determines:

(1) The private vocational training institution can make a significant contribution to attaining the objectives of the five-year State plan and can provide substantially equivalent training at a lesser cost; or

(2) The private vocational training institution can provide equipment or services not available in public institutions.

(d) The State board or local educational agency shall review the contracts with the institutions at least once a year.

(Implements Sec. 120(b)(1)(A); 20 U.S.C. 2330; Sen. Rept. 94-882, p. 67.)

§ 104.515 Apprenticeship programs.

The five-year State plan may provide for related instruction for apprentices who are employed to learn skilled trades. If such programs of instruction are offered, the plan must set forth the following assurances:

(a) The vocational training is supplemental to the on-the-job training experience of the apprentice.

(b) The worker involved in the apprenticeable occupation must be at least 16 years of age, except where a higher minimum age standard is otherwise fixed by law.

(c) The apprentice training agreement must specify a given length of planned work experience training through employment on the job which is supplemented by related instruction.

(d) The skilled trade must possess all of the following characteristics:

(1) It is customarily learned in a practical way through training and work on the job;

(2) It is clearly identified and commonly recognized throughout an industry;

(3) It involves manual, mechanical, technical skills and knowledge; and

(4) It provides equal access to both sexes.

(e) Apprentices will be classified as follows:

(1) Registered. (i) Where the program or the apprentice, or both, are registered under the apprenticeship law of the State in which the apprentice is employed;

(ii) Where the program or the apprentice, or both, are registered by a State apprenticeship agency operating under powers vested in it by legally responsible State authority; and

(iii) Where the program or the apprentice, or both, are registered by the Bureau of Apprenticeship and Training, U.S. Department of Labor, under "standards" or "fundamentals" approved by the Federal Committee on Apprenticeship. Such registration or recognition exists only where neither conditions in paragraph (e)(1)(i) nor paragraph (e)(1)(ii) of this section exist.

(2) Non-registered. Where the program or the apprentice, or both, are not registered under any of the three conditions in paragraphs (e)(1)(i) (ii) and (iii) of this section, but a noncertifiable apprenticeship program is conducted under an implied or written agreement between the apprentice and an individual employer, a group of employees, employer-employee committees, or a governmental agency.

(3) The standards of apprenticeship programs must adhere to the requirements outlined in 29 CFR Part 29 (Department of Labor Apprenticeship Programs).

(29 U.S.C. 50)

WORK-STUDY PROGRAMS

§ 104.521 Use of funds.

A State may use funds under its basic grant (section 120 of the Act) for approved work-study programs, which are described in its approved five-year State plan and annual program plan.

(Sec. 120(b)(1)(B); 20 U.S.C. 2330.)

§ 104.522 Policy and procedure for work-study programs.

A State conducting work-study programs under § 104.521 shall set forth in the approved five-year State plan:

(a) An assurance that the State will adopt policies and procedures to insure that Federal funds used for this purpose will be expended solely for the payment or compensation of students employed pursuant to work-study programs which meet the requirements of § 104.523; and

(b) The principles for determining the priority to be accorded applications from local educational agencies for work-study programs. These principles shall give preference to applications submitted by local educational agencies serving communities having substantial numbers of youths who have dropped out of school or who are unemployed. Work-study programs shall be funded in the order determined by the application of these principles.

(Sec. 120(b)(1)(B), 121(b); 20 U.S.C. 2330. 2331.)

§ 104.523 Requirements of work-study programs.

(a) Work-study programs shall be administered by the local educational agency and shall be made reasonably available (to the extent of available funds) to all youths in the area served by the agency who are able to meet the requirements of paragraph (b) of this section.

(b) Work-study programs shall be furnished only to a student who:

(1) Has been accepted for enrollment as a full-time student in a vocational education program which meets the standards prescribed by the State board and the local educational agency for vocational education programs assisted under this Act, or in the case of a student already enrolled in such a program, is in good standing and in full-time attendance;

(2) Is in need of the earnings from such employment to commence or continue the student's vocational education program; and

(3) Is at least 15 years of age and less than 21 years of age at the commencement of the student's employment, and is capable, in the opinion of the appropriate school authorities, of maintaining good standing in his or her vocational education program while employed under the work-study program.

(Sec. 121; 20 U.S.C. 2331.)

(c) No student shall be employed under a work-study program for more than 20 hours in any week in which classes in which the student is enrolled are in session.

(Implements Sec. 121(a)(3); 20 U.S.C. 2331.)

(d) No student employed under a work-study program shall be compensated at a rate which exceeds the hourly rate prevailing in the area for persons performing similar duties.

(e) Employment under these work-study programs shall be for the local educational agency or for some other public or nonprofit private agency or institution. Students employed in work-study programs assisted under the authority of this section shall not by reason of this employment be deemed employees of the United States, or their service Federal service, for any reason.

(f) In each fiscal year during which the work study program remains in effect, the local educational agency shall expend (from sources other than payments from Federal funds under this section) for the employment of its students (whether or not the employment is an area eligible for assistance under this section) an amount that is not less than its average annual expenditure for work-study programs of a similar character during the three fiscal years preceding the fiscal year in which its work-study program is approved.

(Sec. 121; 20 U.S.C. 2330, 2331.)

COOPERATIVE VOCATIONAL EDUCATION PROGRAMS

§ 104.531 Use of funds.

(a) A State may use funds under its basic grant (section 120 of the Act) for grants to local educational agencies for establishing or expanding cooperative vocational education programs with the participation of public and private employers, when these programs are generally described in the approved five-year State plan and the annual program plan.

(b) The State, in its review of local applications, shall give priority for funding cooperative vocational education programs to local educational agencies in areas that have high rates of school dropouts or youth unemployment.

(Sec. 122 (a), (e); 20 U.S.C. 2332.)

§ 104.532 Assurances in five-year State plan.

A State conducting cooperative vocational education programs under § 104.531 shall provide assurances in the approved five-year State plan that:

(a) Funds will be used only for developing and operating cooperative vocational education programs as defined in Appendix A and which provide training opportunities that may not otherwise be available and which are designed to serve persons who can benefit from these programs;

(b) Necessary procedures are established for cooperation with employment agencies, labor groups, employers, and other community agencies in identifying suitable jobs for persons who enroll in cooperative vocational education programs;

(c) Provision is made, where necessary, for reimbursement of added costs to employers for on-the-job training of students enrolled in cooperative programs, provided that the on-the-job training is related to existing career opportunities susceptible of promotion and advancement and which do not displace other workers who perform the work;

(Sec. 122; 20 U.S.C. 2332)

(d) The program provides cooperative on-the-job training that (1) employs and compensates student-learners in conformity with Federal, State, and local laws and regulations and in a manner not resulting in exploitation of the student-learner for private gain, and (2) is conducted in accordance with written training agreements between local educational agencies and employers;

(Implements Sec. 122(c); 20 U.S.C. 2332.)

(e) Procedures are developed and published for use by local educational agencies for providing ancillary services and activities to assure that quality in cooperative vocational education programs is provided for and may include pre-service and in-service training for teacher coordinators, supervision, curriculum materials, travel for students and coordinators necessary to the success of such programs, and evaluation; and

(f) Policies and procedures will be adopted for accounting, for continuous evaluation of cooperative vocational education programs, and for follow-up of students who have completed or left these programs.

(Sec. 122; 20 U.S.C. 2332.)

§ 104.533 Students in nonprofit private schools.

(a) A State using funds under its basic grant (Section 120 of the Act) for grants to local educational agencies for cooperative vocational education programs shall consult with the appropriate nonprofit private schools.

(b) Each local educational agency receiving funds from the State for cooperative vocational education programs shall:

(1) Identify the students enrolled in nonprofit private schools in the area served by the local educational agency whose educational needs are of the type which the cooperative vocational education programs and services may benefit; and

(2) Assess adequately the needs of the students identified in subparagraph (1) of this paragraph for the cooperative vocational education programs and services being offered; and

(3) Provide the students identified in subparagraph (1) of this paragraph with the opportunity for cooperative vocational education programs and services in a manner which will most effectively meet the needs of these students.

(c) The personnel, materials and equipment necessary to provide cooperative vocational education programs and services to nonprofit private school students shall remain under the administration, direction and control of the local educational agency.

(d) Cooperative vocational education programs carried out by local educational agencies which include students enrolled in nonprofit private schools may be supported up to 100 percent with Federal funds.

(e) Federal funds used to support cooperative vocational education programs which include students enrolled in nonprofit private schools will not be commingled with State or local funds so as to lose their identity. In developing policies and procedures, it shall not be necessary to require separate bank accounts for funds from Federal sources, so long as accounting methods will be established which assure that expenditures of the funds can be separately identified.

(Implements Sec. 122(f); H. Rept. 1085, p 46; 20 U.S.C. 2332.)

ENERGY EDUCATION

§ 104.541 Use of funds.

A State may use funds under its basic grant (section 120 of the Act), when included in the approved five-year State plan and annual program plan, for grants to postsecondary institutions for energy education.

(Sec. 123; 20 U.S.C. 2333.)

§ 104.542 Applications by postsecondary educational institutions.

(a) A State shall make a grant to a postsecondary educational institution only on application by the postsecondary educational institution to the State.

(b) The application shall describe with particularity a program for the training of miners, supervisors, and technicians (particularly safety personnel), and environmentalists in the field of coal mining and coal mining technology, including provision for supplementary demonstration projects or short-term seminars, which program may include curriculums such as:

(1) Extraction, preparation, and transportation of coals;

(2) Reclamation of coal mined land;

(3) Strengthening of health and safety programs for coal mine employees;

(4) Disposal of coal mine wastes; and

(5) Chemical and physical analysis of coal and materials, such as water and soil, that are involved in the coal mining process.

(c) Postsecondary educational institutions may use funds for the acquisition of equipment necessary for the conduct of these programs.

(Sec. 123(a)(1)(2) (A) through (E); 20 U.S.C. 2333.)

§ 104.543 Solar energy.

A State may also use funds under its basic grant (section 120 of the Act) to make grants to postsecondary educational institutions to carry out energy education programs for:

(a) Training of individuals needed for the installation of solar energy equipment; and

(b) Training necessary for the installation of: (1) Glass paneled solar collectors; (2) Wind energy generators; and (3) Other related applications of solar energy.

(Sec. 123(b); 20 U.S.C. 2333.)

CONSTRUCTION OF AREA VOCATIONAL EDUCATION SCHOOL FACILITIES

§ 104.551 Use of funds.

A State may use funds under its basic grant (section 120 of the Act) to pay costs of constructing area vocational education school facilities, in accordance with the approved five-year State plan and annual program plan.

(Sec. 120(b)(1)(E); 20 U.S.C. 2330.)

§ 104.552 Types of facilities.

The State may use funds under the basic grant for construction if the facility meets one of the following requirements:

(a) A specialized high school used exclusively or principally for the provision of vocational education to persons who are available for study in preparation for entering the labor market; or

(b) The department of a high school exclusively or principally used for providing vocational education in no less than five different occupational fields to persons who are available for study in preparation for entering the labor market; or

(c) A technical or vocational school used exclusively or principally for the provision of vocational education to persons who have completed or left high school and who are available for study in preparation for entering the labor market, or

(d) The department or division of a junior college or community college or university operating under the policies of the State board which provides vocational education in no less than five different occupational fields, leading to immediate employment but not necessarily leading to a baccalaureate degree. These vocational education programs must:

(1) Be available to all residents of the State or an area of the State designated and approved by the State board; and

(2) In the case of a school, department, or division described in (c) or (d), admit as regular students both persons who have completed high school and persons who have left high school.

(Sec. 195(2); 20 U.S.C. 2461.)

§104.553 Construction requirements.

An area vocational education school facility constructed under provisions of §§ 104.551 and 104.552 must meet the requirements of (a) non-discrimination provisions in 45 CFR Part 80. This includes 45 CFR 80.3(b)(3) which provides that, in determining the site or location of the facility, a recipient may not make selections with the effect of excluding individuals from, denying them the benefits of, or subjecting them to discrimination on the grounds of race, color, or national origin, Subpart K—"Construction Requirements" in the General Education Provisions Regulations, 45 CFR 100b.155 through 100b.192, and (c) the Architectural Barriers Act of 1968, 42 U.S.C. 4151, pertaining to standards for design, construction and alteration of buildings.

(Sec. 120(b)(1)(E); 20 U.S.C. 2330; 45 CFR 100b.157 through 100b.192 42 U.S.C. 4151)

PROVISION OF STIPENDS

§ 104.571 Use of funds.

A State may use funds under its basic grant (section 120 of the Act), when included in the approved five-year State plan and annual program plan, for the provision of stipends for students entering or already enrolled in vocational education programs if these students have acute economic needs which cannot be met under work-study programs, subject to the restrictions in § 104.572.

(Sec. 120(b)(1)(G); 20 U.S.C. 2330.)

§ 104.572 Restrictions on payment of stipends.

No funds shall be used for the payment of stipends to students entering or already enrolled in programs of vocational education unless the State board first makes a specific finding in each instance of funding that the funding of this particular activity is necessary due to:

(a) Inadequate funding in other programs providing similar activities; or

(b) Other services in the area that are inadequate to meet the needs.

(Sec. 120(b)(1)(G); 20 U.S.C. 2330.)

§ 104.573 Application for payment of stipends by eligible recipients.

An eligible recipient desiring to provide stipends for eligible students under §§ 104.571 and 104.572 shall include a request for funds in the application submitted to the State board and shall provide in the application an assurance that each applicant to be approved meets the requirements of §§ 104.571 and 104.572.

(Sec. 120(b)(1)(G); 20 U.S.C. 2330.)

§ 104.574 Rates for stipends.

Students entering or already enrolled in vocational education programs may be paid stipends at a rate not to exceed the higher of:

(a) The minimum wage prescribed by State or local law multiplied by the number of hours per week the student is enrolled in the vocational eductaion program; or

(b) The minimum hourly wage set out under 6(a)(1) of the Fair Labor Standards Act of 1938, as amended, multiplied by the number of hours per week the student is enrolled in the vocational education program.

(Implements Sec. 120(b)(1)(G); 29 CFR 95.34(c); 20 U.S.C. 2330.)

PLACEMENT SERVICES FOR STUDENTS WHO HAVE SUCCESSFULLY COMPLETED VOCATIONAL EDUCATION PROGRAMS

§ 104.581 Use of funds.

A State may use funds under its basic grant (section 120 of the Act), in accordance with the approved five-year State plan and annual program plan, for providing placement services for students

who have successfuly completed vocational education programs, subject to restrictions in § 104.582.

(Sec. 120(b)(1)(H); 20 U.S.C. 2330.)

§ 104.582 Restrictions on placement services.

A State shall not use funds for placement services for students who have successfully completed vocational education programs, unless the State board first makes a specific finding in each instance of funding that the funding of this particular activity is necessary due to:

(a) Inadequate funding in other programs providing similar activities; or

(b) Other services in the area that are inadequate to meet the needs. For example, if insufficient funds are available under Section 134(a)(3) for the placement of students successfully completing vocational education programs, the State may use funds under the basic grant for this purpose.

(Sec. 120(b)(2); 20 U.S.C. 2330.)

§ 104.583 Application for funds by eligible recipients.

An eligible recipient desiring to provide placement services to students who have successfully completed vocational education programs under § 104.581 shall:

(a) Include the request for funds in the local application submitted to the State board; and

(b) Provide assurances that all placement services to be provided meet the requirements of § 104.582.

(Sec. 120(b)(1)(H); 20 U.S.C. 2330.)

INDUSTRIAL ARTS

§ 104.591 Use of funds.

A State may use funds under its basic grant (section 120 of the Act), when included in the approved five-year State plan and annual program plan, for industrial arts programs which meet the requirements set forth in § 104.592.

(Sec. 120(b)(1)(I); 20 U.S.C. 2330.)

§ 104.592 Industrial arts programs.

Industrial arts education programs which may be funded under § 104.591 are those industrial arts programs which are designed to meet the purposes of this Act (including the elimination of sex stereotyping) and which:

(a) Pertain to the body of related subject matter, or related courses, organized for the development of understanding about all aspects of industry and technology, including learning experiences involving activities such as experimenting, designating, constructing, evaluating, and using tools, machines, materials, and processes; and

(b) Assist individuals in making informed and meaningful occupational choices or which prepare them for entry into advanced trade and industrial or technical education programs.

(Sec. 195(15); 20 U.S.C. 2461.)

SUPPORT SERVICES FOR WOMEN

§ 104.601 Use of funds.

A State may use funds under its basic grant (section 120 of the Act), when included in its approved five-year State plan and annual program plan, for support services for women who enter vocational education programs designed to prepare individuals for employment in jobs which have been traditionally limited to men.

(Sec. 120(b)(1)(J); 20 U.S.C. 2330.)

§ 104.602 Types of support services.

Support services to be provided under § 104.601 include:

(a) *Counseling.* Counseling women entering and enrolled in non-traditional programs on the nature of these programs and on the ways of overcoming the difficulties which may be encountered by women in these programs. Counselors may furnish supportive services to assist students in adjusting to the new employment requirements.

(Implements Sec. 120(b)(1)(J); 20 U.S.C. 2330.)

(b) *Job development.* Programs and activities in the area of job development include the provision of materials and information concerning the world of work which present women students entering, enrolled in, or interested in nontraditional programs the options, opportunities, and range of jobs available in these nontraditional fields. Job development support services may also be carried out through bringing persons employed in these nontraditional fields into the schools, as well as providing opportunities for women students to visit the work place of business and industry so as to afford them a clear understanding of the nature of the work, including an understanding of the work setting in which these jobs are performed.

(Implements Sec. 120(b)(1)(J); 20 U.S.C. 2330; H.R. Rept No. 94-1085, pp. 23-25.)

(c) *Job follow-up support.* Support services may be provided to assist women students in finding employment relevant to their training and interests. Follow-up services may be provided to assist students in the work force, and dealing with barriers which women face in working in these nontraditional areas.

(Implements Sec. 120(b)(1)(J); 20 U.S.C. 2330.)

§ 104.603 Support to increase number of women instructors.

In funding programs and activities of support services for women, funds may be used to increase the number of women instructors involved in the training of individuals in programs which have traditionally enrolled mostly males, so as to provide supportive examples for these women who are preparing for jobs in these nontraditional areas of employment.

(Implements Sec. 120)(b)(1)(J); 20 U.S.C. 2330; H.R. Rept. No. 1085, p. 24.)

DAY CARE SERVICES FOR CHILDREN OF STUDENTS

§ 104.611 Use of funds.

A State may use funds under its basic grant (section 120 of the Act), when included in the approved five-year State plan and annual program plan, to provide day care services for children of students (both male and female and including single parents) in secondary and postsecondary vocational education programs.

(Sec. 120(b)(1)(K); 20 U.S.C. 2330.)

§ 104.612 Day care services.

(a) Day care services shall be for the purpose of providing appropriate care and protection of infants, pre-school and school-age children in order to afford students who are parents the opportunity to participate in vocational education programs.

(b) The day care services provided under this section shall be governed by the Federal Interagency Day Care Requirements (45 CFR Part 71).

(Implements Sec. 120(b)(1)(K); 20 U.S.C. 2330.)

VOCATIONAL EDUCATION PROGRAMS FOR DISPLACED HOMEMAKERS AND OTHER SPECIAL GROUPS

§ 104.621 Use of funds.

A State shall use funds under its basic grant (section 120 of the Act) in accordance with its approved five-year State plan and annual program plan to provide vocational education programs for the following special groups:

(a) Persons who had been homemakers but who now, because of dissolution of marriage, must seek employment;

(b) Persons who are single heads of households and who lack adequate job skills;

(c) Persons who are currently homemakers and part-time workers but who wish to secure a full-time job; and

(d) Women who are now in jobs which have been traditionally considered jobs for females and who wish to seek employment in job areas which have not been traditionally considered as job areas for females, and men who are now in jobs which have been traditionally considered jobs for males and who wish to seek employment in job areas which have not been traditionally considered as job areas for males.

(Secs. 107(b)(4)(B), 120(b)(1)(L); 20 U.S.C. 2307, 2330)

§ 104.622 Scope of programs.

The State shall fund programs, in accordance with the policies and procedures described in its approved five-year State plan pursuant to § 104.187(b), to

assess and meet the needs of the groups described in § 104.621. These programs shall include:

(a) Organized educational programs necessary to prepare these special groups for employment, including the acquisition, maintenance and repair of instructional equipment;

(b) Special courses preparing these individuals in how to seek employment; and

(c) Provision of placement service for the graduate of these programs.

(Implements Sec. 120(b)(1)(L); 20 U.S.C. 2330.)

CONSTRUCTION AND OPERATION OF RESIDENTIAL VOCATIONAL SCHOOLS

§ 104.631 Use of funds.

A State may use funds under its basic grant (section 120 of the Act) when included in its five-year State plan and annual program plan for the construction equipment, and operation of residential vocational schools, including room, board, and other necessities.

(Sec. 120(b)(1)(M); 20 U.S.C. 2330.)

§ 104.632 Residential vocational schools.

A residential vocational school is an institution which provides vocational education for youths (males and females) who are at least 15 years of age and less than 21 years of age at the time of enrollment, and who need full-time study on a residential basis in order to benefit fully from the education. For the purposes of this section, institutions to which juveniles are assigned as a result of their delinquent conduct are not residential vocational schools. (This does not prohibit States from using funds under section 120 of the Act for the provision of vocational education programs in correctional institutions.)

(Sec. 124; 20 U.S.C. 2334.)

§ 104.633 Special considerations for residential vocational schools.

(a) States shall give special consideration to the needs of large urban areas and isolated rural areas having substantial numbers of youths who have dropped out of school or who are unemployed.

(b) Funds may not be used for schools in which students are segregated because of race.

(Sec. 124(b); 20 U.S.C. 2334.)

§ 104.634 Construction requirements.

When Federal funds are used to pay part of the cost of constructing a residential vocational school, the facility must meet the requirements of § 104.553.

(Sec. 120(b)(1)(M); 20 U.S.C. 2330; 45 CFR 100b.187 through 100b.192.)

Subpart 3—Program Improvement and Supportive Services

§ 104.701 Authorization of grants.

A State shall use 20 percent of the funds allotted pursuant to section 102(a) of the Act for any of the following purposes, except as provided in § 104.762(a):

(a) Program improvement described in § 104.702;

(b) Vocational guidance and counseling described in § 104.761;

(c) Vocational education personnel training described in § 104.771;

(d) Grants to overcome sex bias and sex stereotyping described in § 104.791;

(e) State administration of the five-year State plan and annual program plan described in § 104.306; and

(f) Local supervision and administration of vocational education programs, services, and activities described in § 104.307.

(Secs. 103(e), 130; 20 U.S.C. 2303, 2350.)

PROGRAM IMPROVEMENT

§ 104.702 Purpose.

The purpose of program improvement is to improve vocational education by the support of research programs, exemplary and innovative programs, and curriculum development programs.

(Sec. 130; 20 U.S.C. 2350.)

§ 104.703 Research coordinating unit.

(a) In order to expend funds for program improvement, the State shall establish a research coordinating unit to coordinate the research, exemplary and innovative programs, and curriculum development activities in the State.

(b) The State shall set forth the organizational structure of this research coordinating unit in the five-year State plan.

(c) The State shall develop a comprehensive plan of program improvement which includes:

(1) The intended uses of funds available under section 130 of the Act to support activities of program improvement;

(2) A description of the State's priorities for program improvement; and

(3) The procedures to be used by the research coordinating unit to insure that the findings and results of the program improvement activities in the State are disseminated throughout the State in a coordinated fashion.

(d) The State shall include the comprehensive plan of program improvement in the five-year State plan and annual program plan.

(e) The research coordinating unit shall submit to the Commissioner and to the National Center for Research in Vocational Education the following:

(1) Two copies of an abstract of each approved project for program improvement, within 30 calendar days after approval of the project, containing the source and amount of funds obligated for the project; and

(2) Two copies of the final report resulting from the State project, within three months after the ending date of the project.

(f) The research coordinating unit may use funds available under section 130 of the Act for the purposes set forth in §§ 104.705, 104.706, and 104.708. This unit may contract for the performance of activities described in §§ 104.705, 104.706, and 104.708, or this unit may perform the activities set forth in § 104.705, using its own staff. The cost of the professional and support staff of the research coordinating unit is supportable with Federal funds available under section 130 of the Act.

(Implements Secs. 130, 131, 132, 133, 171; 20 U.S.C. 2350 through 2353, 2401; H.R. Rept. 94-1085, p. 44; H.R. Rept. 94-1701, pp. 225-226.)

§ 104.704 Contract requirements.

No contract shall be made pursuant to §§ 104.705, and 104.708 unless the applicant can demonstrate a reasonable probability that the contract will result in improved teaching techniques or curriculum materials that will be used in a substantial number of classrooms or other learning situations within five years after the termination date of such contracts.

(Sec. 131(b), 133(b); 20 U.S.C. 2351, 2353.)

§ 104.705 Use of funds for research programs.

A research coordinating unit may use funds available under section 130 of the Act directly or by contract for:

(a) Applied research and development in vocational education;

(b) Experimental, developmental, and pilot programs and projects designed to test the effectiveness of research findings, including programs and projects to overcome problems of sex bias and sex stereotyping;

(c) Improved curriculum materials for presently funded programs in vocational education and new curriculum materials for new and emerging job fields, including a review and revision of any curricula developed under this section to insure that such curricula do not reflect stereotypes based on sex, race, or national origin;

(d) Projects in the development of new careers and occupations, such as:

(1) Research and experimental projects designed to identify new careers in such fields as mental and physical health, crime prevention and correction, welfare, education, municipal services, child care, and recreation, requiring less training than professional positions, and to delineate within such career roles with the potential for advancement from one level to another;

(2) Training and development projects designed to demonstrate improved methods of securing the involvement, cooperation, and commitment of both the public and private sectors toward the end of achieving greater coordination and more effective implementation of programs for the employment of persons in the fields described in subparagraph (1) including programs to prepare professionals (including administrators) to work effectively with aides; and

(3) Projects to evaluate the operation of programs for the training, development, and utilization of public service aides particularly their effectiveness in providing satisfactory work experiences and in meeting public needs; and

(e) Dissemination of the results of the contracts made pursuant to paragraphs

(a) through (d), as well as the results of other research projects, including employment of persons to act as disseminators on a local level, of these results.

(Sec. 131(a); 20 U.S.C. 2351.)

§ 104.706 Use of funds for exemplary and innovative programs.

(a) The research coordinating unit may use funds available under section 130 of the Act directly or by contract for:

(1) Programs to develop high quality vocational education programs for urban centers with high concentrations of:

(i) Economically disadvantaged individuals;

(ii) Unskilled workers; and

(iii) Unemployed individuals.

(2) Programs to develop training opportunities for:

(i) Persons in sparsely populated rural areas; and

(ii) Individuals migrating from farms to urban areas.

(3) Programs of effective vocational education for persons of limited English-speaking ability;

(4) Establishment of cooperative arrangements between public education and manpower agencies, designed to correlate vocational education opportunities with current and projected needs of the labor market; and

(5) Programs designed to broaden occupational aspirations and opportunities for youth, especially for youth who have academic, socioeconomic, or other handicaps. These programs include:

(i) Programs and project to familiarize elementary and secondary students with the broad range of occupations for which special skills are required and the requisites for careers in those occupations; and

(ii) Programs and projects to facilitate the participation of employers and labor organizations in postsecondary vocational education.

(6) Dissemination of the results of these contracts made under the authority of paragraphs (a) through (e), including employment of persons to act as disseminators, on a local level, of these results.

(Sec. 132(a); 20 U.S.C. 2352.)

(b) Every contract made by a research coordinating unit for the purpose of funding exemplary and innovative projects shall:

(1) Give priority to programs and projects designed to reduce sex bias and sex stereotyping in vocational education;

(2) To the extent consistent with the number of students enrolled in private nonprofit schools in the area to be served, whose educational needs are of the type which the program is designed to meet, make provision (in accordance with the requirements set forth in § 104.533) for the participation of these students in the programs; and also

(3) Provide that the Federal funds made available for exemplary and innovative programs to accommodate students in nonprofit private schools will not be commingled with State or local funds.

(Sec. 132(b); 20 U.S.C. 2352.)

§ 104.707 Disposition of exemplary and innovative programs.

The State shall indicate in the annual program plan and accountability report covering the final year of financial support by the State for any exemplary and innovative program:

(a) The proposed disposition of the program when Federal support ends; and

(b) The means by which successful or promising programs will be continued and expanded within the State.

(Sec. 132(c); 20 U.S.C. 2352.)

§ 104.708 Use of funds for curriculum development programs.

The research coordinating unit may use funds available under section 130 of the Act directly or by contract for:

(a) Development and dissemination of vocational education curriculum materials for new and changing occupational fields;

(b) Development and dissemination of vocational education curriculum materials for:

(1) Handicapped persons;

(2) Disadvantaged persons (other than handicapped persons);

(3) Persons of limited English-speaking ability;

(c) Development and dissemination of curriculum and guidance and testing materials designed to overcome sex bias and sex stereotyping in vocational educational programs;

(d) Support services designed to enable teachers to meet the needs of individuals enrolled in vocational education programs traditionally limited to members of the opposite sex; and

(e) Development and dissemination of other curriculum materials designed to improve the State's vocational education programs.

(Sec. 133(a); 20 U.S.C. 2353.)

VOCATIONAL GUIDANCE AND COUNSELING

§ 104.761 Purpose.

The purpose of vocational guidance and counseling assistance is to improve the State's vocational education programs by providing support for vocational development guidance and counseling programs, services, and activities.

(Secs. 130(b)(4), 134(a); 20 U.S.C. 2350, 2354.)

§ 104.762 Conformity with five-year State plan.

(a) A State shall use not less than 20 percent of the Federal funds available under section 130 of the Act to support vocational development guidance and counseling programs, services, and activities.

(b) The expenditure of funds for this purpose shall be in accordance with the approved five-year State plan and annual program plan.

(Sec. 134; 20 U.S.C. 2354; Sen. Rept. 94-882, p. 80.)

§ 104.763 Kinds of programs, services, and activities.

Funds made available to a State under the vocational guidance and counseling program (section 134 of the Act) shall be used to support one or more of the following activities:

Guidance and counseling.

(a) Initiation, implementation, and improvement of high quality vocational guidance and counseling programs and activities;

(b) Vocational counseling for children, youth, and adults, leading to a greater understanding of educational and vocational options;

(c) Provision of educational and job placement programs and follow-up services for students in vocational education and for individuals preparing for professional occupations or occupations requiring a baccalaureate or higher degree. Follow-up services provided to baccalaureate or higher degree students shall be only for students enrolled on or after October 1, 1977;

(d) Vocational guidance and counseling training designed to acquaint guidance counselors with (1) the changing work patterns of women, (2) ways of effectively overcoming occupational sex stereotyping, and (3) ways of assisting girls and women in selecting careers solely on their occupational needs and interests, and to develop improved career counseling materials which are free;

(e) Vocational and educational counseling for youth offenders and adults in correctional institutions;

(f) Vocational guidance and counseling for persons of limited English-speaking ability;

(g) Establishment of vocational resource centers to meet the special needs of out-of-school individuals, including individuals seeking second careers, individuals entering the job market late in life, handicapped indivduals, individuals from economically depressed communities or areas, and early retirees; and

(h) Leadership for vocational guidance and exploration programs at the local level.

(Implements Sec. 134(a); 20 U.S.C. 2354; Sen. Rept. No. 95-142.)

§ 104.764 Special emphasis.

Recipients of funds allocated by the State for programs, services, and activities listed in § 104.763 (a) or (b) shall use those funds, insofar as is practicable:

(a) To bring individuals with experience in business and industry, the professions, and other occupational pursuits into schools as counselors or advisors for students;

(b) To bring students into the work establishments of business and industry, the professions, and other occupations to acquaint students with the nature of work accomplished therein; and

(Sec. 134(b); 20 U.S.C. 2354.)

(c) To enable guidance counselors to obtain experience in business and industry, the professions, and other occupational pursuits which will better enable those counselors to carry out their guidance and counseling duties.

(Sec. 134(b); 20 U.S.C. 2354; Conf. Rept. No. 94–1701, p. 225.)

VOCATIONAL EDUCATION PERSONNEL TRAINING

§ 104.771 Purpose.

The purpose of vocational education personnel training is to improve the State's vocational education programs and the services which support those programs by improving the qualifications of persons serving or preparing to serve in vocational education programs.

(Sec. 135(a); 20 U.S.C. 2355.)

§ 104.772 Conformity with five-year State plan.

(a) The State may use funds available under section 130 of the Act to support vocational education personnel training programs.

(Sec. 135(a); 20 U.S.C. 2355.)

(b) In order to be eligible for support under section 130 of the Act, specific programs and projects of training must be in accord with the general plan for vocational education personnel training as set forth in the approved five-year State plan and annual program plan for vocational education.

(Sec. 130(b); 20 U.S.C. 2350.)

§ 104.773 Eligible participants.

Training may be provided to persons serving or preparing to serve in vocational education programs, including teachers, administrators, supervisors, and vocational guidance and counseling personnel.

(Sec. 135(a); 20 U.S.C. 2355.)

§ 104.774 Types of training.

Funds available to the State under section 130 of the Act may be used to support programs and projects designed to improve the qualifications of persons who are eligible under § 104.773, including (but not limited to) the following:

(a) Training or retraining for teachers, and supervisors and trainers of teachers, in vocational education in new and emerging occupations;

(b) In-service training for vocational education teachers and other staff members, to improve the quality of instruction, supervision, and administration of vocational education programs, and to overcome sex bias and sex stereotyping in vocational education programs;

(c) Provisions for exchange of vocational education teachers and other personnel with skilled workers or supervisors in business, industry, and agriculture (including mutual arrangements for preserving employment and retirement status and other employment benefits during the period of exchange), and the development and operation of cooperative programs involving periods of teaching in schools providing vocational education and of experience in commercial, industrial, or other public or private employment related to the subject matter taught in such schools;

(d) Training to prepare journeymen in the skilled trades or occupations for teaching positions;

(e) Training, including in-service training, for teachers and supervisors and trainers of teachers in vocational education to improve the quality of instruction, supervision and administration of vocational education for persons who are disadvantaged, or handicapped, or who are of limited English-speaking ability, and to train or retrain counseling and guidance personnel to meet the special needs of these persons;

(f) Provision of short-term or regular-session institutes designed to improve the qualifications of persons entering or reentering the field of vocational education in new and emerging occupational areas in which there is a need for such personnel.

(Sec. 135(a); 20 U.S.C. 2355.)

§ 104.775 Grants or contracts.

The State board may make grants or contracts, in accordance with its five-year State plan and annual program plan, in support of both training and retraining programs and projects to provide:

(a) Both pre-service and in-service education; and

(b) Both regular-session (academic year) institutes and short-term institutes.

(Sec. 135 (a)(6), (b); 20 U.S.C. 2355.)

§ 104.776 Stipends to trainees.

Within the limits set in paragraphs (c) through (f) of this section, the State board may, at its discretion, authorize payment of:

(a) Stipends to participating trainees in programs or projects supported under section 135 of the Act; and

(b) Allowances for other expenses for such trainees and their dependents.

(Sec. 135(b); 20 U.S.C. 2355.)

(c) *Part-time and short-term training.* For part-time training and for short-term training (for periods not in excess of the equivalent of ten working days), the upper limits of stipends per participant are:

(1) Per hour of actual training, a sum not in excess of the average amount earned per hour of teaching by full-time classroom teachers in the State;

(2) Per full day of training, a sum not in excess of six times the rate per hour set in paragraph (c)(1) of this section; and

(3) Per five-day week of training, a sum not in excess of five times the rate per day set in paragraph (c)(2) of this section.

(d) *Full-time academic year or summer session.* The upper limits for stipends per participant for full-time training are:

(1) Per academic year of approximately nine months, a sum not in excess of $4500; and

(2) Per summer session of at least six weeks, a sum not in excess of $900.

(e) *Other periods of full-time training.* For full-time training for periods of more than the equivalent of ten full days and less than six weeks, the stipend is limited to a sum calculated at a rate proportionate to $500 per calendar month.

(f) *Other allowances.* In addition to the sum allowable under authority of paragraphs (c), (d), and (e) of this section, the State may make payments only as follows:

(1) For the cost of participant travel to and from training sites, a participant is allowed the same per-mile rate for automobile travel as an employee of the State educational agency;

(2) For support of dependents of participants, a sum not in excess of:

(i) $675 per dependent for each academic year of full-time training; and

(ii) $170 per dependent for full-time training during a summer session of at least six weeks.

(Implements Sec. 135(b); 20 U.S.C. 2355.)

GRANTS TO OVERCOME SEX BIAS AND SEX STEREOTYPING

§ 104.791 Purpose.

The purpose of grants under § 104.792 is to support activities which show promise of overcoming sex bias and sex stereotyping in vocational education.

(Secs. 130(b)(6), 136; 20 U.S.C. 2350, 2356.)

§ 104.792 Conformity with five-year State plan.

(a) A State may use funds available under section 130 of the Act to support grants to overcome sex bias and sex stereotyping in vocational education programs.

(Sec. 136; 20 U.S.C. 2356.)

(b) The expenditure of funds for this purpose shall be in accordance with the approved five-year State plan and annual program plan. The plans shall describe the types of projects to be funded.

(Sec 130(b); 20 U.S.C. 2350.)

§ 104.793 Types of projects.

Funds may be used for projects such as:

(a) Research projects on ways to overcome sex bias and sex stereotyping in vocational educational programs;

(b) Development of curriculum materials free of sex stereotyping;

(c) Development of criteria for use in determining whether curriculum materials are free from sex stereotyping.

(d) Examination of current curriculum materials to assure that they are free of sex stereotyping; and

(e) Training to acquaint guidance counselors, administrators, and teachers with ways of effectively overcoming sex bias and sex stereotyping, especially in assisting persons in selecting careers ac-

cording to their interests and occupational needs rather than according to stereotypes.

(Implements Sec. 136; 20 U.S.C. 2356.)

Subpart 4—Special Programs for the Disadvantaged

§ 104.801 Grants to States for special programs for the disadvantaged.

A State shall use the funds allocated to it from the separate authorization (section 102(b) of the Act) for special programs for the disadvantaged as defined in § 104.804 and Appendix A of these regulations.

(Sec. 140; 20 U.S.C. 2370.)

§ 104.802 Use of funds.

(a) A State shall use the funds available under § 104.801, in accordance with the approved five-year State plan and annual program plan, for special programs of vocational education for disadvantaged persons in areas of high concentration of youth unemployment or school dropouts.

(b) A State shall use the funds under § 104.801 to pay up to 100 percent of the cost of special programs for disadvantaged persons.

(c) Funds available under § 104.801 may be used in addition to funds made available to the State for basic grants (section 120 of the Act): *Provided*, That the funds are used to conduct special programs of vocational education for the disadvantaged to enable them to succeed in vocational education programs.

(Sec. 140; 20 U.S.C. 2370.)

§ 104.803 Students in nonprofit private schools.

A State may grant funds to eligible recipients only if:

(a) Provision (in accordance with the requirements set forth in § 104.533) has been made for the participation of students enrolled in nonprofit private schools in the area to be served whose educational needs are of the type which the program or projects involved is to meet, to the extent consistent with the number of such students; and

(b) Effective policies and procedures have been adopted which assure that Federal funds made available under this subpart to accommodate students in nonprofit private schools will not be commingled with State or local funds.

(Sec. 140(b)(2); 20 U.S.C. 2370.)

§ 104.804 Criteria of need and eligibility.

(a) The term "disadvantaged" means persons (other than handicapped persons) who:

(1) Have academic or economic disadvantages; and

(2) Require special services, assistance, or programs in order to enable them to succeed in vocational education programs.

(Sec. 195(16); 20 U.S.C. 2461.)

(b) "Academic disadvantage," for the purposes of this definition of "disadvantaged," means that a person:

(1) Lacks reading and writing skills;

(2) Lacks mathematical skills; or

(3) Performs below grade level.

(c) "Economic disadvantage," for the purposes of this definition of "disadvantaged," means:

(1) Family income is at or below national poverty level;

(2) Participant or parent(s) or guardian of the participant is unemployed;

(3) Participant or parent of participant is recipient of public assistance; or

(4) Participant is institutionalized or under State guardianship.

(Implements Sec. 140; 20 U.S.C. 2370.)

(d) Eligibility for participation in the special programs supported under § 104.801 is limited to persons who (because of academic or economic disadvantage):

(1) Do not have, at the time of entrance into a vocational education program, the prerequisites for success in the program; or who

(2) Are enrolled in a vocational education program but require supportive services or special programs to enable them to meet the requirements for the program that are established by the State or the local educational agency.

(Implements Sec. 140; 20 U.S.C. 2370.)

Subpart 5—Consumer and Homemaking Education

§ 104.901 Grants to States for consumer and homemaking education.

A State shall use the funds allotted to it from the separate authorization (section 102(c) of the Act) for programs of consumer and homemaking education.

(Sec. 150(a); 20 U.S.C. 2380.)

§ 104.902 Use of funds.

A State shall use the funds available under section 150 of the Act, in accordance with its approved five-year State plan and annual program plan, solely for:

(a) Programs in consumer and homemaking; and

(b) Ancillary services in relation to programs under paragraph (a) of this section.

(Sec. 150(b); 20 U.S.C. 2380.)

§ 104.903 Programs in consumer and homemaking education.

(a) Programs in consumer and homemaking education may be conducted at all educational levels (elementary, secondary, postsecondary or adult).

(b) Programs in consumer and homemaking education consist of instructional programs, services, and activities for the occupation of homemaking.

(c) Programs for the occupation of homemaking include (but are not limited to):

(1) Consumer education;

(2) Food and nutrition;

(3) Family living and parenthood education;

(4) Child development and guidance;

(5) Housing and home management (including resource management); and

(6) Clothing and textiles.

(Sec. 150(b); 20 U.S.C. 2380.)

§ 104.904 Purpose of programs in consumer and homemaking education.

A State shall set forth in the five-year State plan and annual program plan the programs in consumer and homemaking education which it intends to support. Funds available under section 150 of the Act shall only be provided to support edprograms in consumer and homemaking education which:

(a) Encourage participation of both males and females to prepare for combining the roles of homemakers and wage earners;

(b) Encourage elimination of sex stereotyping by promoting the development of curriculum materials which deal with:

(1) Increased numbers of women working outside the home;

(2) Increased numbers of men assuming homemaking responsibilities;

(3) Changing career patterns of men and women; and

(4) Appropriate Federal and State laws relating to equal opportunity in education and employment;

(c) Give greater consideration to economic, social, and cultural conditions and needs, especially in economically depressed areas and, where appropriate, to bilingual instruction;

(d) Encourage eligible recipients to operate outreach programs in communities for youth and adults, giving consideration to their special needs, such as (but not limited to):

(1) The aged;

(2) Young children;

(3) School-age parents;

(4) Single parents;

(5) Handicapped persons;

(6) Educationally disadvantaged persons;

(7) Programs connected with health care delivery systems, such as providing parenthood education, nutrition education and consumer education; and

(8) Programs providing services for courts and correctional institutions, such as providing child development and guidance programs for short term court offenders;

(e) Prepare males and females who have entered or are preparing to enter into the work of the home; and

(f) Emphasize the following areas in order to meet current societal needs:

(1) Consumer education;

(2) Management of resources;

(3) Promotion of nutritional knowledge and food use; and

(4) Promotion of parenthood education.

(Sec. 150(b); 20 U.S.C. 2380.)

§ 104.905 Ancillary services.

A State may use funds available under section 150 of the Act to provide ancillary services, activities, and other means of assuring quality in all consumer and homemaking education programs. These ancillary services may include (but are not limited to): (a) Teacher training; (b) teacher supervision; (c) curriculum development; (d) research; (e) program evaluation; (f) special demonstration

and experimental programs; (g) development of instructional materials; (h) exemplary projects; (i) provision of equipment; (j) State administration and leadership; and (k) guidance and counseling.

(Implements sec. 150(b)(2); 20 U.S.C. 2380.)

§ 104.906 Federal share.

(a) A State shall use funds appropriated under section 102(c) of the Act for section 150 of the Act to pay up to 50 percent of the cost of (1) programs in consumer and homemaking education under §§ 104.903 and 104.904 and (2) ancillary services and activities under §104.905.

(b) A State shall use at least one-third of the funds available as stated in paragraph (a) to pay up to 90 percent of the cost of programs in economically depressed areas or areas with high rates of unemployment for program designed to: (1) Assist consumers; (2) help improve home environments; and (3) help improve the quality of family life.

(Sec. 150(c), (d); 20 U.S.C. 2380.)

PART 105—COMMISSIONER'S DISCRETIONARY PROGRAMS OF VOCATIONAL EDUCATION

GENERAL

Sec.
105.1 Scope.
105.2 Purpose.
105.3 Definitions.
105.4 Applicability of General Education Provisions Regulations.
105.5 Applicability of technical review criteria.

Subpart 1—Program Improvement

105.101 Purpose.
105.102 National center for research in vocational education.
105.103 Armed services curriculum materials.
105.104 Authorized activities.
105.105 Eligible applicants.
105.106 No cost sharing.
105.107 Duration of project support.
105.108 Improved teaching techniques or curriculum materials.
105.109 Exemplary and innovative projects.
105.110 Technical review criteria.
105.111 Additional application review factors.

Subpart 2—Indian Tribes

Sec.
105.201 Purpose.
105.202 Applicability of the Indian Self-Determination Act of 1975.
105.203 Definitions.
105.204 Assistance contracts.
105.205 Eligible applicants.
105.206 Applications for assistance contracts.
105.207 Review for duplication of effort.
105.208 No cost sharing.
105.209 Duration of awards.
105.210 Final reports.
105.211 Technical review criteria.
105.212 Additional factors for declining to contract.
105.213 Hearing by the Commissioner after declining to enter into a contract.
105.214 Remaining funds.

Subpart 3—Training and Development Programs for Vocational Education Personnel

LEADERSHIP DEVELOPMENT AWARD PROGRAM

105.301 Purpose.
105.302 Leadership development awards.

Sec.
105.303 Equitable geographical distribution.
105.304 Eligibility of individuals.
105.305 Application procedures.
105.306 Stipends to individuals.
105.307 Conditions for continued eligibility.
105.308 Payment conditioned on appropriation.
105.309 Technical review criteria.
105.310 Assignment to approved institution.
105.311 Institutional eligibility and approval.
105.312 Institutional allowance.

VOCATIONAL EDUCATION CERTIFICATION FELLOWSHIP PROGRAM

105.431 Purpose.
105.432 Awards to two categories of fellows.
105.433 Fellowship period.
105.434 Application procedures.
105.435 Equitable geographical distribution.
105.436 Stipends to fellows.
105.437 Conditions for continued eligibility.
105.438 Payment conditioned on appropriation.
105.439 Institutional allowance.
105.440 Institutional eligibility and approval.
105.441 Teaching fields in need of additional teachers.
105.442 Content of applications.
105.443 Technical review criteria.

Subpart 4—Emergency Assistance for Remodeling and Renovating of Vocational Education Facilities

105.501 Purpose.
105.502 Eligible applicants.
105.503 Content of applications.
105.504 Submission of applications through the State board.
105.505 Technical review criteria.
105.506 Payments to local educational agencies.
105.507 Construction requirements.

Subpart 5—Bilingual Vocational Education

BILINGUAL VOCATIONAL TRAINING PROGRAM

105.601 Purpose.
105.602 Eligible programs.
105.603 Eligible applicants.
105.604 Applications for grants or contracts.
105.605 Review of applications.
105.606 Technical review criteria.
105.607 Additional application review factors.

BILINGUAL VOCATIONAL INSTRUCTOR TRAINING PROGRAM

105.611 Purpose.
105.612 Eligible programs.
105.613 Eligible applicants.
105.614 Applications for grants or contracts.
105.615 Review of applications.
105.616 Technical review criteria.
105.617 Additional application review factors.

BILINGUAL VOCATIONAL INSTRUCTIONAL MATERIALS, METHODS, AND TECHNIQUES PROGRAM

105.621 Purposes.
105.622 Eligible programs.
105.623 Eligible applicants.
105.624 Applications for grants or contracts.
105.625 Review of applications.
105.626 Technical review criteria.
105.627 Additional application review factors.

AUTHORITY: Secs. 101–195 of Title II of Pub. L. 94-482 as further amended by Pub. L. 95-40 (20 U.S.C. 2301 to 2461), unless otherwise noted.

GENERAL

§ 105.1 Scope.

Part 105 contains regulations interpreting or implementing Part B (entitled "National Programs") of Title I of the Vocational Education Act of 1963, as amended by section 202 of Title II of the Education Amendments of 1976, Pub. L. 94-482 (referred to as "the Act"). Part 105 also contains regulations interpreting or implementing the Commissioner's discretionary program of contracts with Indian tribes contained in section 103 (a)(1)(B) of the Act.

(Sec. 103(a)(1)(B); Secs. 171 through 195; 20 U.S.C. 2303, 2401 et seq.)

§ 105.2 Purpose.

The purpose of Part 105 is to set forth the regulations which govern the Commissioner's discretionary programs of grants and contracts for vocational education.

(Secs. 171 through 195; 20 U.S.C. 2401 et seq.)

§ 105.3 Definitions.

The definitions common to all parts of the Act are contained in section 195 of the Act. These definitions and additional definitions necessary for the State vocational education programs are set forth in Appendix A of Part 104. Definitions necessary only for Part 105 are set forth in this Part 105 in the subparts in which they apply.

(Sec. 195; 20 U.S.C. 2461.)

§ 105.4 Applicability of General Education Provisions Regulations.

Provisions in Parts 100 and 100a of the General Education Provisions Regulations (45 CFR Parts 100 and 100a), entitled "General Provisions for Office of Education Programs," are applicable to programs under this Part 105.

(45 CFR Parts 100, 100a.)

§ 105.5 Applicability of technical review criteria.

(a) The technical review criteria in § 105.110 for Program Improvement and in § 105.626 for Bilingual Vocational Instructional Materials, Methods, and Techniques Program apply to the review of applications submitted for grants only.

(b) The evaluation of proposals submitted for procurement contracts for the two programs identified in paragraph (a) of this section are made in accordance with the Federal Procurement Regulations, Title 41, Code of Federal Regulations, Chapters 1 and 3. Technical review criteria that are consistent with the Act will be developed for each procurement contract and will be set forth specifically in the Request for Proposal (RFP) for the particular contract. These criteria will be consistent with the Act and the regulations. The RFP will be announced in the Commerce Business Daily (CBD).

(45 CFR Chapters 1 and 3.)

Subpart 1—Program Improvement

§ 105.101 Purpose.

The purpose of program improvement is to support projects for the improvement of vocational education and a national center for research in vocational education as authorized in section 171 of the Act. Funds available to the Commissioner for program improvement under section 103 of the Act will be used primarily for contracts and in some cases for grants.

(Secs. 103, 171; 20 U.S.C. 2303, 2401.)

§ 105.102 National center for research in vocational education.

(a) The Commissioner will support a national center for research in vocational education. The center (a nonprofit agency) will be chosen once every five years. The Commissioner will appoint an advisory committee to assist the center. The center shall have such research locations, including contracts with one or more regional research centers, as shall be determined by the Commissioner after consultation with the national center and its advisory committee taking into consideration the vocational education research resources available, geographical area to be served, and the schools, programs, projects, and students and areas to be served by research activities.

(b) The center shall directly or through other public agencies:

(1) Conduct applied research and development on problems of national significance in vocational education;

(2) Provide leadership development through an advanced study center and in-service education activities for State and local leaders in vocation education;

(3) Disseminate the results of research and development projects funded by the center;

(4) Develop and provide information to facilitate national planning and policy development in vocational education;

(5) Act as a clearinghouse for information on projects supported by the States and the Commissioner and compile an annotated bibliography of research, exemplary and innovative projects, and curriculum development projects assisted with funds made available under this Act since July 1, 1970; and

(6) Work with States, local educational agencies, and other public agencies in developing methods of evaluating programs, including the follow-up studies of program completers and leavers required by section 112 of the Act, so that these agencies can offer job training programs which are more closely related to the types of jobs available in their communities, regions, and States.

(Sec. 171(a)(2); 20 U.S.C. 2401.)

§ 105.103 Armed services curriculum materials.

The Commissioner will make contracts to convert to use in local educational agencies, private nonprofit schools, and other public agencies curriculum materials involving job preparation which have been prepared for use by the armed services of the United States.

(Sec. 171(b)(3); 20 U.S.C. 2401.)

§ 105.104 Authorized activities.

(a) The Commissioner will support projects of national significance for improvement of vocational education. The projects include the following activities as authorized in sections 131 through 136 of the Act:

(1) Research (section 131 of the Act);

(2) Exemplary and innovative programs (section 132 of the Act);

(3) Curriculum development (section 133 of the Act);

(4) Vocational guidance and counseling (section 134 of the Act);

(5) Vocational education personnel training (section 135 of the Act); and

(6) Grants to assist in overcoming sex bias and sex stereotyping (section 136 of the Act).

(b) Functions under the above may include: applied research and development; experimental and pilot programs; curriculum revision and development; demonstration, dissemination, and utilization of research and development products; personnel training; and evaluation.

(Secs. 131 through 136, 171(a)(1); 20 U.S.C. 2351–56, 2401.)

§ 105.105 Eligible applicants.

(a) Eligible applicants for project support include:

(1) Public organizations, institutions, and agencies;

(2) Nonprofit and profit-making private organizations, institutions, and agencies; and

(3) Individuals.

(b) Profit-making private organizations, institutions, and agencies, and individuals are eligible for contracts only.

(c) Eligible applicants for the national center for research in vocational education include nonprofit agencies only.

(Interprets Sec. 171; 20 U.S.C. 2401.)

§ 105.106 Cost sharing.

No cost sharing is required. The Commissioner may pay all or part of the cost.

(Interprets Sec. 171(b)(5)(A); 20 U.S.C. 2401.)

§ 105.107 Duration of project support.

The Commissioner will not support a project for a period to exceed three fiscal years.

(Sec. 171(b)(5)(B); 20 U.S.C. 2401.)

§ 105.108 Improved teaching techniques or curriculum materials.

The Commissioner will not make a grant pursuant to § 105.104 unless the applicant can demonstrate a reasonable probability that the grant will result in improved teaching techniques or curriculum materials that will be used in a substantial number of classrooms or other learning situations within five years after the termination date of the grant.

(Sec. 171(b)(1); 20 U.S.C. 2401.)

§ 105.109 Exemplary and innovative projects.

(a) The Commissioner will make a contract for an exemplary and innovative project only if the project provides for the participation of students enrolled in nonprofit private schools consistent with:

(1) The number of such students in the area to be served by the project; and

(2) The educational needs of those students is of the type which the project involved is to meet.

(b) The contract shall provide that the Federal funds will not be commingled with State or local funds.

(Sec. 171(b)(2); 20 U.S.C. 2401.)

§ 105.110 Technical review criteria.

The following criteria will be used in reviewing applications. These criteria are consistent with 45 CFR 100a.26, Review of Applications, in the General Provisions for Office of Education Programs. A segment or segments of an application should address each criterion. Each criterion is weighted and includes the maximum score that can be given to an application in relation to the criterion. The maximum score for the criteria is 100 points, and the maximum weight for each criterion is listed below. Applications that receive less than 50 points will not be funded.

(a) *National need.* (Maximum 15 points.) The need section clearly: (1) Describes the national need in vocational education for the proposed project; (2) Provides specific evidence of the need; (3) Indicates specifically who or what will be helped; and (4) Describes the problem rather than symptoms of the problem.

(b) *Literature review.* (Maximum 5 points.) The literature review is sufficiently comprehensive to:

(1) Establish the basis for the problem;

(2) Describe the problem in contrast to the symptoms of the problem;

(3) Provide a strong conceptual framework for the proposed objectives and proposed plan, including the general design and specific procedures of the proposed plan, along with the management, evaluation, dissemination, and training procedures, when appropriate; and

(4) Describe what has been done previously to alleviate the problem and point out the gaps that will be alleviated by this specific proposed work.

(c) *Objectives.* (Maximum 10 points.) The objectives are related to the problem and: (1) Are significant for vocational education; (2) Clearly describe proposed project outcomes; (3) Are capable of being attained; and (4) Are measurable.

(d) *Plan.* (Maximum 18 points.) The plan clearly describes: (1) The overall design for the proposed project; and (2) The specific procedures by which each objective will be accomplished. Normally the plan will include:

(i) Precise definitions of terms; (ii) Description of the characteristics and number of subjects; (iii) Sampling procedures and control groups; (iv) Instru-

mentation; and (v) Statistical and analytical procedures.

(e) *Management plan.* (Maximum 8 points.) The management plan adequately describes the way in which personnel and resources will be used to accomplish each component of the plan developed in criterion (c).

(f) *Evaluation plan.* (Maximum 8 ponts.) The plan includes valid and reliable instruments and procedures for assessing and documenting the impact of project results and end products or outcomes in terms of the achievement of project goals and objectives.

(g) *Results, end products, outcomes, and dissemination.* (Maximum 10 points.) The application clearly describes:

(1) What will be delivered to the government; (2) The format in which the results, products, or outcomes will be delivered to the government;

(3) The way in which results, products, or outcomes will be developed or provided for dissemination purposes to specified user populations; and

(4) The procedures to be used in disseminating the results, end products, or outcomes at the local, State, and/or national levels.

(h) *Staff competencies and experience.* (Maximum 7 points.) The application clearly describes:

(1) The names and qualifications (including project management qualifications) of the project director, key professional staff, advisory groups, and consultants;

(2) Time commitments planned for the project by the project director, key staff, advisory groups, and consultants;

(3) Evidence of past and successful experience of the proposed project director and key staff members in similar or related projects;

(4) Use of professional staff members from minorities or women; and

(5) The competencies that are required for the proposed project.

(i) *Budget and cost effectiveness.* (Maximum 7 points.) The application provides a justifiable and itemized statement of cost which is substantiated by line items in the proposed budget and appears to be cost effective with respect to proposed results, products, or outcomes.

(j) *Institutional capability and commitment.* (Maximum 4 points.) The application provides adequate evidence of:

(1) Institutional or individual's experience and commitment to the proposed work;

(2) Appropriate facilities and equipment; and

(3) Assurance of support from cooperating agencies, local educational agencies, postsecondary institutions, business, industry, and labor, where applicable for successful implementation of the project.

(k) *Sex bias and stereotyping.* (Maximum 8 points.) The application provides appropriate plans to eliminate sex bias and stereotyping in the proposed results, end products, and outcomes, and the proposed dissemination plans.

(Implements Sec. 171; 20 U.S.C. 2401.)

§ 105.111 Additional application review factors.

In addition to the criteria listed in § 105.110, the Commissioner may utilize factors such as the following in making decisions regarding whether to fund applications: (a) Duplication of effort; (b) Duplication of funding; and (c) Evidence that an applicant has not performed satisfactorily on previous projects.

(Implements Sec. 171; 20 U.S.C. 2401.)

Subpart 2—Indian Tribes

Contract Program for Indian Tribes and Indian Organizations

§ 105.201 Purpose.

The purpose of the program for Indian tribes and Indian organizations is for the Commissioner, at the request of an Indian tribe, to make a contract or contracts directly with Indian tribal organizations, with funds available under section 103(a)(1) of the Act, to plan, conduct, and administer programs, or portions thereof, which are authorized by and consistent with the Act, particularly section 103(a)(1)(B)(iii) of the Act.

(Sec. 103(a)(1); 20 U.S.C. 2303.)

§ 105.202 Applicability of the Indian Self-Determination Act of 1975.

(a) Any contract entered into under this subpart is subject to the provisions of sections 4, 5, 6, 7(b) and 102 of the "Indian Self-Determination and Education Assistance Act of 1975," Pub. L. 93-638.

(b) Regulations implementing the above sections of the Indian Self-Determination and Education Assistance Act, Title 25 of the Code of Federal Regulations, §§ 271.44, 271.46, 271.47, and 271.50 are applicable to the extent that they are relevant and practicable.

(c) Whenever the term "Secretary of the Interior" is used, in the Indian Self-Determination and Education Assistance Act, the term means, for the purposes of this subpart, "Commissioner of Education."

(Sec. 103(a)(1)(B)(iii); 20 U.S.C. 2303; 25 U.S.C. 450a, et seq.)

§ 105.203 Definitions.

(a) "Indian tribe" means any Indian tribe, band, nation, or other organized group or community, including any Alaskan native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act which is recognized as eligible for special programs and services provided by the United States to Indians because of their status as Indians.

(b) "Tribal organization" means the recognized governing body of any Indian tribe or any legally established organization of Indians which is controlled, sanctioned, or chartered by such governing body or which is democratically elected by the adult members of the Indian community to be served by the organization and which includes the maximum participation of Indians in all phases of its activities.

(25 U.S.C. 450b.)

§ 105.204 Assistance contracts.

Awards will be made competitively through assistance contracts governed by Subchapter A of Title 45, Code of Federal Regulations (entitled "General Provisions for Office of Education Programs"), except to the extent that appropriate sections of the Indian Self-Determination and Education Assistance Act of 1975 apply or to the extent that more specific regulations in this subpart apply. The criteria in 45 CFR 100a.26(b) do not apply to this program.

(Sec. 103(a)(1)(B)(iii); 20 U.S.C. 2303; 25 U.S.C. 450e(b).)

§ 105.205 Eligible applicants.

An Indian tribal organization of an Indian tribe which is eligible to contract with the Secretary of the Interior for the administration of programs under the Indian Self-Determination and Education Assistance Act of 1975 or under the Act of April 16, 1934, is eligible for assistance contracts.

(Sec. 103(a)(1)(B)(iii)); 20 U.S.C. 2303; 25 U.S.C. 450f.)

§ 105.206 Applications for assistance contracts.

An application from an eligible tribal organization must be submitted to the Commissioner by the Indian tribe and must contain the information that the Commissioner requires. An application which serves more than one Indian tribe shall be approved by each tribe to be served in the application.

(Sec. 103(a)(1)(B)(iii); Pub. L. 93-638; 20 U.S.C. 2303; 25 U.S.C. 450b(c).)

§ 105.207 Review for duplication of effort.

An applicant shall submit a copy of the application directly to the Commissioner of the Bureau of Indian Affairs and the State board at the same time it submits an application to the Office of Education in order to avoid duplication of funding.

(Implements Sec. 103(a)(1)(B)(iii); 20 U.S.C. 2303.)

§ 105.208 No cost sharing.

No cost sharing by the applicant is required.

(Implements Sec. 103(a)(1)(B)(iii); 20 U.S.C. 2303.)

§ 105.209 Duration of awards.

(a) The total project period of an award may not exceed three years. The Commissoner may make multi-year awards if the nature of the project warrants multi-year funding. Continuation funding is contingent upon satisfactory performance. Application for multi-year awards shall have a detailed budget for the current year and total budget figures for the subsequent years.

(b) A request for continuation of a project beyond the project period will

be considered a new application and will be reviewed competitively with all other applications. In order for the Commissioner to make this determination, an applicant who has had a prior contract under this program shall include an evaluation of the previous project.

(Implements Sec. 103(a)(1)(B)(iii); 45 CFR 100a.432; 20 U.S.C. 2303.)

§ 105.210 Final reports.

The contractor shall submit final financial status and performance reports as the Commissioner shall request.

(45 CFR 100a.403; 45 CFR 100a.432; 20 U.S.C. 2303.)

§ 105.211 Technical review criteria.

The following criteria will be utilized in reviewing applications. These criteria are consistent with 45 CFR 100a.26(b), Review of Applications, in the General Provisions for Office of Education Programs. A segment or segments of an application should address each criterion. Each criterion is weighted and includes the maximum score that can be given to an application in relation to the criterion. The maximum aggregate score for the criteria is 100 points, and the maximum weight for each criterion is listed below in parentheses. Points will be awarded to the extent that evidence in the application satisfies each criterion. The review of these criteria shall constitute the basis for the Commissioner to enter or decline to enter into a contract with an eligible applicant. If the review of any application results in no recommendation to fund (where funds are available), this will mean that it is not satisfactory, as that term is used in the Indian Self-Determination Act (section 102). Applications must receive a minimum of 30 points to be considered for funding.

(25 U.S.C. 450f.)

(a) *Program improvement.* (Maximum 15 points.) The application focuses on the improvement of occupational training opportunties for Indians and delineates the way in which the proposed program will contribute to improved programs for the specific target group.

(b) *Need.* (Maximum 10 points.) The need section clearly: (1) Describes the need for the proposed activity; (2) Provides specific evidence of the need; (3) Indicates specifically how the need will be met; and (4) Describes, where appropriate, ongoing and planned activities in the community relative to the need.

(c) *Objectives.* (Maximum 10 points.) The objectives: (1) Relate to the need; (2) Are significant for vocational education; (3) Clearly describe proposed program outcomes;

(4) Are capable of being attained; and

(5) Are measurable.

(d) *Plan.* (Maximum 15 points) The plan clearly describes the way in which the objectives will be accomplished by:

(1) The overall design for the proposed program; and

(2) The use of specific procedures to implement activities designed to accomplish each objective of each segment of the proposed program;

(3) A description of: (i) Specific activities to be conducted in the proposed program;

(ii) Instruments to be used in the proposed program;

(iii) Instructional material to be used in the proposed program, if appropriate; and

(iv) Population to be served in the proposed program; and

(4) Statistical and analytical procedures, if appropriate.

(e) *Management plan.* (Maximum 10 points) The management plan adequately describes the way in which personnel and resources will be utilized to accomplish each objective, the overall design, and each major procedure.

(f) *Evaluation plan.* (Maximum 10 points.) The plan includes valid and reliable instruments and procedures for assessing and documenting the impact of project results in terms of the achievement of project goals and objectives.

(g) *Applicant's staff competencies and experience.* (Maximum 10 points.) Points will be awarded on the extent to which the application clearly describes: (1) The competencies that are required for the proposed project;

(2) The names and qualifications (including project management qualifications) of the project director, key professional staff, advisory groups, and any consultants;

(3) Time commitments planned for the project by the project director, key staff, advisory groups, and any consultants;

(4) Evidence of past and successful experience of the proposed project director and key staff members in similar or related projects;

(5) Evidence of commitment to section 7(b) of the Indian Self-Determination and Education Assistance Act.

(h) *Budget and cost effectiveness.* (Maximum 10 points.) Points will be awarded on the extent to which the application provides a justifiable and itemized statement of cost which contains line items in the proposed budget and appears to be cost effective with respect to proposed results.

(i) *Institutional capability and commitment.* (Maximum 10 points.) The application provides adequate evidence of: (1) Institutional experience and commitment to the proposed work;

(2) Appropriate facilities and equipment; and

(3) Documented assurances of support from cooperating local educational agencies, postsecondary institutions, business, industry, or labor, if support from any of these groups is necessary for successful implementation of the project.

(Implements Sec. 103(a)(1)(B)(iii); 20 U.S.C. 2303; 25 U.S.C. 450f.)

§ 105.212 Additional factors for declining to contract.

In addition to the weighted technical review criteria listed in § 105.211, the Commissioner may use any of the factors listed below in making a decision whether to decline to enter into a contract with an eligible applicant.

(a) The program duplicates an effort already being made;

(b) Funding the program would create an inequitable distribution among tribes; or

(c) The applicant has not performed satisfactorily under a previous Office of Education award.

(Implements Sec. 103(a)(1)(B)(iii); 20 U.S.C. 2303; 25 U.S.C. 450f.)

§ 105.213 Hearing by the Commissioner after declining to enter into a contract.

After receiving notice from the Commissioner that the Office of Education will not award a contract to an eligible applicant, the tribal organization or the tribe shall have 30 calendar days to request a hearing, in writing, to review the Commissioner's decision.

(25 U.S.C. 450f.)

§ 105.214 Remaining funds.

From any remaining funds reserved for this subpart, the Commissioner is authorized to enter into an agreement with the Commissioner of the Bureau of Indian Affairs for the operation of vocational education programs authorized by this Act in institutions serving Indians as described in section 103(a)(B)(i) of the Act. The Secretary of the Interior is authorized to receive funds for that purpose.

(Sec. 103(a)(1)(B)(iii); 20 U.S.C. 2303.)

Subpart 3—Training and Development Programs for Vocational Education Personnel

Leadership Development Award Program

§ 105.301 Purpose.

The purpose of the leadership development award program is to provide opportunities for experienced vocational educators to spend full time in advanced study of vocational education.

(Sec. 172(a)(1); 20 U.S.C. 2402.)

§ 105.302 Leadership development awards.

(a) *Awards.* The Commissioner will make leadership development awards to qualified vocational education personnel (such as administrators, supervisors, teacher educators, researchers, guidance and counseling personnel, and instructors in vocational education) for graduate training in an approved vocational education leadership development program of an approved institution of higher education.

(Sec. 172(b)(1), (3); 20 U.S.C. 2402.)

(b) *Award period.* Leadership development awards will be made for a period not to exceed 36 months.

(Sec. 172(b)(2)(A); 20 U.S.C. 2402.)

§ 105.303 Equitable geographical distribution.

In order to meet the needs for qualified vocational educational personnel in all the States, the Commissioner, without using any pre-determined formula for allocation among the States, but after

applications have been reviewed and scored on their merits, will make leadership development awards in an equitable manner among the States. The Commissioner will take into account such factors as:

(a) The State's vocational education enrollments; and

(b) The incidence of youth unemployment and school dropouts in the State.

(Sec. 172(b)(4); 20 U.S.C. 2402.)

§ 105.304 Eligibility of individuals.

(a) A person is eligible to receive a leadership development award if such person:

(1) Has had not less than two years of experience in vocational education or in business or industrial training or military technical training, or in the case of researchers, experience in social science research which is applicable to vocational education; and

(2) Is currently employed or is reasonably assured of employment in vocational education and has successfully completed, as a minimum, a baccalaureate degree program; and

(3) Is recommended by his or her employer, or others, as having leadership potential in the field of vocational education and is eligible for admission as a graduate student to a program of higher education approved by the Commissioner under § 105.311.

(b) In order to receive a leadership development award the person selected shall enroll for full-time graduate study in a vocational education leadership development program approved under § 105.311.

(Sec. 172(b)(1), (5); 20 U.S.C. 2402.)

§ 105.305 Application procedures.

(a) *Submission of applications.* Any eligible individual who wishes to receive a leadership development award shall submit an application to the Commissioner and send one copy of the application to the State board for vocational education for the State in which the applicant is a resident.

(b) *Role of the State board.* The State board, with advice from the State advisory council, from other agencies involved in State planning and reporting, and from representatives of vocational education programs in institutions of higher education, will:

(1) Review the application;

(2) Collect advice as to the merits of each application from the other agencies and the representatives noted in this paragraph;

(3) Advise the Commissioner as to the merits of each application; and

(4) Forward all applications and statements of advice to the Commissioner for review and decision by the Commissioner.

(Implements Sec. 172(a)(1); 20 U.S.C. 2402. H.R. Rept. No. 94-1085, pp. 54-55.)

§ 105.306 Stipends to individuals.

(a) *Academic year.* Each person awarded a leadership development award is entitled to receive a stipend of:

(1) $4500 for each academic year of full-time study at the institution of higher education; and

(2) $675 for each academic year for each dependent.

(b) *Summer session.* An additional stipend may be awarded of:

(1) $900 for full-time summer study at the same institution of higher education; and

(2) $170 for this period for each dependent.

(Implements Sec. 172(b)(2)(A); 20 U.S.C. 2402.)

§ 105.307 Conditions for continued eligibility.

(a) *Satisfactory participation.* A recipient of an award may continue to receive payments under § 105.306 only during such periods as the Commissioner finds that the recipient:

(1) Is maintaining satisfactory proficiency in study or research in the field of vocational education in an institution of higher education;

(2) Is devoting essentially full time to such study or research; and

(3) Is not engaging in gainful employment, other than part-time employment in teaching, research, or similar activities endorsed by that institution and approved by the Commissioner.

(Sec. 172(b)(5); 20 U.S.C. 2402; H.R. Rept. No. 94-1085, pp. 55-56.)

(b) *Employment limitation.* The limitation with respect to employment set forth in paragraph (a)(3) of this section does not apply to the period of time between an academic year and a summer session (or between academic years if a stipend is not received under § 105.306(b) for full-time study).

(Implements Sec. 172(b)(5); 20 U.S.C. 2402.)

§ 105.308 Payment conditioned on appropriation.

Leadership development award payments under § 105.306 after the first year of the award period (in case of awards made for a period exceeding twelve months) are subject to the continued availability of Federal funds under section 172 of the Act.

(Interprets Sec. 172; 20 U.S.C. 2402.)

§ 105.309 Technical review criteria.

The Commissioner will use the following criteria in reviewing applications. The criteria in 45 CFR 100a.26(b) do not apply to this program. A segment or segments of an application should address each criterion. Each criterion is weighted and includes the maximum score that can be given to an application in relation to the criteria. The maximum score for the criteria is 100 points, and the maximum weight for each criterion is listed below. An application must receive a minimum of 50 points to be considered for funding.

(a) *Academic ability.* (Maximum 30 points) The applicant provides evidence of his or her academic ability. This must include: (1) Transcripts of grades earned in college, including graduate courses; and may include (2) Scores earned on the Graduate Record Examination, Miller Test of Analogies, or similar tests; and (3) Results earned on specific skill aptitude tests.

(b) *Leadership potential.* (Maximum 20 points). The applicant provides evidence of leadership potential. This may include awards or recognition received for: (1) Professional service; (2) Community activities; (3) Work with advisory committees; (4) Volunteer work; (5) Outstanding skill in interpersonal relations; and (6) Other activities as appropriate.

(c) *Managerial skills.* (Maximum 15 points) The applicant provides information concerning his or her experience in a managerial or administrative capacity. This may include evidence of the applicant's ability in: (1) Planning; (2) Problem solving; (3) Decision making; and (4) Other skills, where appropriate.

(d) *Communication skills.* (Maximum 20 points) The applicant provides evidence of experience in activities requiring oral and written language skills. This may include:

(1) Public speaking experience to professional, community, or other groups;

(2) Articles published in professional or popular journals; and

(3) Other written materials such as reports, abstracts, and instructional materials.

(e) *National need.* (Maximum 15 points.) The degree to which the applicant's goals, objectives, and aspirations in vocational education relate to national needs in vocational education, including developing expertise to serve: (1) disadvantaged persons; (2) members of minority groups, and (3) handicapped persons.

(H.R. Rept. No. 94-1085, p. 55.)

(g) *Additional criteria.* In addition to the criteria listed above the Commissioner will consider the following factors: (1) Equitable distribution among males and females; (2) Geographical distribution; (3) Membership in minority groups.

(Implements Sec. 172(a)(1); 20 U.S.C. 2402; U.S.C. 2402; H.R. Rept. No. 94-1085, p. 55.)

§ 105.310 Assignment to approved institution.

Each applicant for an award shall identify a first, second, and third choice of institutions (approved under § 105.311) he or she desires to attend. The Commissioner reserves the right to redistribute award recipients among approved institutions in order to assure that each institution will have a sufficient number of awardees to assure the effectiveness of the program of vocational leadership development.

(Implements Sec. 172(a)(1); 20 U.S.C. 2402; H.R. Rept. No. 94-1085, p. 55.)

§ 105.311 Institutional eligibility and approval.

Upon receipt of an application from an institution of higher education requesting approval of its vocational education leadership development program,

the Commissioner will approve the program only upon finding that:

(a) The institution offers a comprehensive program in vocational education with adequate supporting services and disciplines, such as education administration, guidance and counseling, research, and curriculum development, including:

(Sec. 172(b)(3)(A); 20 U.S.C. 2402.)

(1) Training in those leadership skills necessary to increase the participation of disadvantaged and underrepresented persons such as the handicapped, disadvantaged minorities, and women, in vocational education programs at all levels;

(Sec. 101(1); 20 U.S.C. 2301; H.R. Rept. No. 94-1085, p. 55.)

(2) Resources and supporting services for at least five of the generally recognized fields of vocational education, integrated into a comprehensive approach to vocational education;

(3) Practical experience and internship components; and

(Implements Sec. 172(b)(3)(A); 20 U.S.C. 2402.)

(4) A focus on familiarizing the individual with new curriculum materials in vocational education.

(Sec. 172(b)(7); 20 U.S.C. 2402.)

(b) The program under paragraph (a) of this section is designed to further substantially the objective of improving vocational education by providing opportunities for graduate training for vocational education teachers, supervisors, guidance and counseling personnel, and administrators, and of university level vocational education teacher educators and researchers.

(c) The program is conducted by a school of graduate study.

(Interprets Sec. 172(b)(3)(B); 20 U.S.C. 2402.)

§ 105.312 Institutional allowance.

(a) The Commissioner will (in addition to the stipend paid to an award recipient under § 105.306) pay an institutional allowance to the institution of higher education in which the recipient is pursuing a course of study, in the amount of $3,200 per participant, per academic year, with an additional $800 per participant for full-time study during the summer session.

(b) The institutional allowance is made in lieu of tuition and all non-refundable fees and deposits that would otherwise be required of the student.

(c) Any portion of the institutional allowance in excess of normal tuition, non-refundable fees, and deposits attributable to the awardee shall be used by the institution to improve the program of vocational education leadership development in that institution.

(Implements Sec. 172(b)(2)(B); 20 U.S.C. 2402.)

VOCATIONAL EDUCATION CERTIFICATION FELLOWSHIP PROGRAM

§ 105.431 Purpose.

The purpose of the vocational education certification fellowships is to provide opportunities for:

(a) Certified teachers who have been trained to teach in other fields to become vocational educators if those teachers have skills and experience in vocational fields for which there is a need for vocational teachers and for which they can be trained to be vocational educators; and

(Sec. 172(a)(2); 20 U.S.C. 2402.)

(b) Persons in industry, business, and agriculture who have skills and experience in vocational fields for which there is need for vocational educators (but who do not necessarily have baccalaureate degrees) to become vocational educators.

(Interprets Sec. 172(a)(3); 20 U.S.C. 2402.)

§ 105.432 Awards to two categories of fellows.

The Commissioner is authorized to award fellowships to two categories of persons for undergraduate study in institutions of higher education:

(a) Persons who are or have been certified by a State as teachers in elementary and secondary schools, community and junior colleges, and other thirteenth and fourteenth year programs within the ten-year period prior to the current closing date for applications under this program and who:

(1) Have or have had skills and experience in vocational fields for which there is a need for vocational teachers and for which they can be trained to be vocational educators; and

(2) Are unable to find employment in their field of previous training.

(Sec. 172(c)(1), (c)(1)(A); 20 U.S.C. 2402.)

(b) Persons (not necessarily baccalaureate degree holders) employed in industry, business, or agriculture who:

(1) Have skills and experience in vocational fields in which there is a need for vocational educators; and

(2) Have been accepted by a teacher training institution for enrollment in a program which will assist them in becoming vocational educators.

(Sec. 172(c)(1)(B); 20 U.S.C. 2402.)

§ 105.433 Fellowship period.

Fellowships will be made for periods not to exceed 24 months.

Sec. 172(c)(2)(A); 20 U.S.C. 2402.)

§ 105.434 Application procedures.

(a) *Submission of applications.* Any eligible individual who wishes to receive a vocational education certification fellowship shall submit an application to the Commissioner and send one copy of the application to the State board for vocational education for the State in which the applicant is a resident.

(b) *Role of the State board.* The State board, with advice from the State advisory council, from other agencies involved in State planning and reporting, and from representatives of vocational education programs in institutions of higher education, will:

(1) Review the applications;

(2) Collect advice as to the merits of each application;

(3) Advise the Commissioner as to the merits of each application; and

(4) Forward all applications and statements of advice to the Commissioner for review and decision by the Commissioner.

(Implements Sec. 172(c)(1); 20 U.S.C. 2402; H.R. Rept. No. 94-1085, p. 54.)

§ 105.435 Equitable geographical distribution.

In order to meet the needs for qualified vocational education personnel in all the States, the Commissioner, without using any pre-determined formula for allocation among the States, but after applications have been reviewed and scored on their merits will make certification fellowship awards in an equitable manner among the States, taking into account such factors as:

(a) The State's vocational education enrollment; and

(b) The incidence of youth unemployment and school dropouts in the State.

(Sec. 172(c)(4); 20 U.S.C. 2402.)

§ 105.436 Stipend to fellows.

(a) *Academic year.* Each person awarded a fellowship is entitled to receive a stipend of:

(1) $4500 for each academic year of full-time study at the institution of higher education to which that person is assigned for the fellowship period; and

(2) $675 for each academic year for each dependent.

(b) *Summer session.* An additional stipend may be awarded of:

(1) $900 for full-time summer study at the same institution of higher education; and

(2) $170 for this period for each dependent.

(Implements Sec. 172(c)(2)(A); 20 U.S.C. 2402.)

§ 105.437 Conditions for continued eligibility.

(a) *Satisfactory participation.* A recipient of a fellowship may continue to receive payment under § 105.436 only during such period as the Commissioner finds that the recipient:

(1) Is maintaining satisfactory proficiency in study or research in the field of vocational education in an institution of higher education;

(2) Is devoting essentially full time to such study or research; and

(3) Is not engaging in gainful employment, other than part-time employment in teaching, research, or similar activities endorsed by that institution and approved by the Commissioner.

(Implements Sec. 172(c)(5); 20 U.S.C. 2402; H.R. Rept. No. 94-1085, pp. 55-56.)

(b) *Employment limitations.* The limitation with respect to employment set forth in paragraph (a)(3) of this

section does not apply to the period of time between an academic year and a summer session, or between academic years if a stipend is not received under § 105.436(b) for full-time summer study.

(Interprets Sec. 172(c)(5); 20 U.S.C. 2402.)

§ 105.438 Payment conditioned on appropriation.

Fellowship payments under § 105.436 after the first year of the fellowship period (in case of awards made for a period exceeding twelve months) are subject to the continued availability of Federal funds under section 172 of the Act.

(Interprets Sec. 172; 20 U.S.C. 2402.)

§ 105.439 Institutional allowance.

(a) The Commissioner will (in addition to the stipends paid to a fellowship recipient under § 105.436) pay an institutional allowance to the institution of higher education at which the recipient is pursuing his or her course of study in an amount of $2,000 per participant per academic year, with an additional $500 per participant for full-time study during the summer session;

(b) The institutional allowance is made in lieu of tuition and all non-refundable fees and deposits that would otherwise be required of the fellow; and

(c) Any portion of the institutional allowance in excess of the normal tuition, non-refundable fees, and deposits attributable to the fellow shall be used by the institution to improve the program of vocational education in that institution.

(Implements Sec. 172(c)(2)(B); 20 U.S.C. 2402.)

§ 105.440 Institutional eligibility and approval.

The Commissioner will approve the vocational education fellowship program of an institution of higher education only upon finding that:

(a) The program is capable of enabling unemployed certified teachers or persons from business, industry, or agriculture to become certified vocational education teachers;

(Interprets Sec. 172(c)(1)(B); 20 U.S.C. 2402.)

(b) The institution offers a program in vocational education which is sufficiently comprehensive to meet, at the undergraduate level, the requirements for certification of the applicant in the State where the institution is located;

(c) In the case of applicants seeking certification in a particular area of study designated by the Commissioner as being in need of additional personnel, the institution is capable of preparing students for certification in that particular area;

(Implements Sec. 172(c)(7); 20 U.S.C. 2402.)

(d) The fellow will receive education and training of the same type as that offered by the institution to undergraduate students preparing to become vocational education teachers; and

(e) The undergraduate program in vocational education includes adequate support services and disciplines, such as education administration, guidance and counseling, special education for the handicapped, research, and curriculum development.

(Implements Sec. 172(c)(3); 20 U.S.C. 2402.)

§ 105.441 Teaching fields in need of additional teachers.

The Commissioner will publish, before the beginning of each fiscal year, a listing of the areas of teaching in vocational education where there are or will be shortages of personnel and will, to the maximum degree possible, award fellowships under § 105.432 to applicants seeking to become teachers in the areas identified.

(Sec. 172(c)(7); 20 U.S.C. 2402.)

§ 105.442 Content of applications.

(a) *For certified teachers.* Each certified teacher applicant shall provide in his or her application evidence of:

(1) Certification as a teacher in an elementary or secondary school or junior or community college or other thirteenth and fourteenth grade program within the ten-year period prior to the current closing date for applications under this program; and

(2) Past or current skills and experiences in the vocational field(s) in which there is a need for additional educators and for which he or she seeks training as a vocational educator; and

(3) Inability to find employment in his or her field of previous certification.

(b) *For applicants not certified as teachers.* Each applicant who has not been a certified teacher shall provide in his or her application evidence of:

(1) The nature and duration of his or her employment in business, agriculture, or industry; and

(Interprets Sec. 172(c)(1)(B); 20 U.S.C. 2402.)

(2) Having skills and experiences in one of the vocational areas where vocational educators are needed.

(Sec. 172(c)(1)(B); 20 U.S.C. 2402.)

(c) *Assurance by the institution.* The institution of higher education designated in the application for a fellowship shall provide in that application an assurance that the:

(1) Applicant has been accepted for enrollment in the program of vocational education designated in the application; and the

(2) Institution meets the requirements for institutional eligibility set forth in paragraphs (a) through (e) of § 105.440.

(Implements Sec. 172(c)(3); 20 U.S.C. 2402.)

§ 105.443 Technical review criteria.

The Commissioner will use the following criteria in reviewing formally transmitted applications. The criteria in 45 CFR 100a.26(b) do not apply to this program. A segment or segments of an application should address each criterion. Each criterion is weighted and includes the maximum score that can be given to an application in relation to the criteria. The maximum score for the criteria is 100 points, and the maximum weight for each criterion is listed below. An application must receive a minimum of 50 points to be considered for funding.

(a) *Academic ability.* (Maximum 25 points.) The applicant provides evidence of his or her level of academic achievement and academic ability. This may include: (1) Transcripts of grades earned in secondary school and, where appropriate, college; (2) Results earned on specific skill aptitude tests; and (3) Results of other tests, where appropriate.

(b) *Vocational skills.* (Maximum 35 points.) The applicant provides evidence of his or her performance in a work situation requiring vocational skills. This may include: (1) Letters of recommendations of previous employers or others, as appropriate; (2) Results of National Occupational Competency Testing Institute, where appropriate; (3) Certificates or diplomas, as appropriate; and (4) Work related experience, including teaching, where appropriate.

(c) *Communication skills.* (Maximum 15 points.) The applicant provides evidence of experience in activities requiring oral and written language skills. This may include:

(1) Public speaking experience to professional, community, or other groups;

(2) Articles published in newspapers, professional or popular journals; and

(3) Other written materials such as reports, abstracts, or other materials, where appropriate.

(d) *Human relations skills.* (Maximum 15 points.) The applicant presents evidence of skills in interpersonal relations. This may include experience with: (1) Professional groups; (2) Community groups; (3) Volunteer groups; (4) Work related organizations; (5) Members of minority groups, the disadvantaged, and handicapped persons; and (6) Other groups, as appropriate.

(e) *National need.* (Maximum 10 points.) The applicant describes in writing his or her goals, objectives, and aspirations in vocational education and their relationship to national needs in vocational education with particular reference to the elimination of sex stereotyping and working with the following populations: (1) Disadvantaged persons; (2) Members of minority groups; and (3) Handicapped persons.

(H.R. Rept. No. 94-1085, p. 55.)

(f) *Additional factors.* In addition to the criteria listed above, the Commissioner will consider the following factors: (1) Equitable distribution among males and females; (2) Geographical distribution; (3) Membership in minority groups; and (4) The applicant's intention to become certified in a vocational field not traditionally open to persons of the applicant's sex, or to become certified in a new field or one not commonly taught.

(Implements Sec. 101(3), 172(b)(4); 20 U.S.C. 2301, 2402; H.R. Rept. No. 94-1085, p. 55.)

Subpart 4—Emergency Assistance for Remodeling and Renovating of Vocational Education Facilities

§ 105.501 Purpose.

The purpose of this program is to provide emergency assistance to local educational agencies in urban and rural areas which are unable to provide vocational education designed to meet today's manpower needs due to the age of their vocational education facilities or the obsolete nature of the equipment used for vocational training. The purpose is to assist those local educational agencies in the modernization of facilities or equipment and the conversion of academic facilities necessary to assure that the facilities will be able to offer vocational education programs which give reasonable promise of employment.

(Sec. 191; 20 U.S.C. 2441.)

§ 105.502 Eligible applicants.

(a) Any local educational agency in an urban or rural area is an eligible applicant.

(Sec. 193(a); 20 U.S.C. 2443.)

(b) "Rural area" means an area which is not included within a Standard Metropolitan Area (as defined by the U.S. Bureau of Census) and which is not within or coterminous with, a city, town, borough, or village, or other subcounty political unit, the population of which exceeds 2,500.

(c) "Urban area" means an area within a city, town, or borough with a population of over 100,000.

(Implements Sec. 198(a); 20 U.S.C. 2443.)

§ 105.503 Content of applications.

An application for a grant or assistance contract shall set forth:

(a) A description of the facility to be remodeled or renovated, including:

(1) The date of completion of construction of the facility (or the part of the facility to be remodeled or renovated);

(2) The extent of remodeling or renovation necessary to enable the facility to provide a modern program of vocational education;

(b) A description of the equipment to be replaced or modernized and reference to the particiular purpose for which the equipment will be used;

(c) A description of the extent to which the modernization or conversion of facilities and equipment will be consistent with, and further the goals of, the five-year State plan, including the elimination of sex and racial bias and sex stereotyping in vocational education programs;

(d) The financial ability of the local educational agency to undertake the modernization without Federal assistance;

(Implements Sec. 193(a)(1)-(4); 20 U.S.C. 2443.)

(e) Assurance that the facility to be remodeled or renovated will meet standards adopted pursuant to the Architectural Barriers Act;

(Sec. 193(a)(5); 20 U.S.C. 2443; 42 U.S.C. 4151-4156.)

(f) The extent of State and local funds available to match Federal funds together with the sources and amounts of the funds;

(g) Such other information as the State board determines to be appropriate.

(Sec. 193(a) (6), (7); 20 U.S.C. 2443.)

(h) The reasons why renovation or remodeling rather than replacement is planned or why some other facility is not available;

(i) The cost of each major item of renovation or remodeling; and

(j) Facts showing that renovation or remodeling is cost effective.

(Implements Sec. 193(a)(8); 20 U.S.C. 2443.)

§ 105.504 Submission of applications through the State board.

An applicant shall send the application to the Commissioner through the State board.

(Sec. 193(a); 20 U.S.C. 2443.)

§ 105.505 Technical review criteria.

(a) The Commissioner will rank all applicants according to their relative need for assistance.

(Sec. 193(C); 20 U.S.C. 2443.)

(b) The relative need for assistance will be determined by the following criteria (total 100 points):

(1) The age or obsolesence of the facilities and equipment for which assistance is sought (maximum 17 points);

(2) The rate of youth unemployment in the labor market area served by the local educational agency (maximum 12 points);

(3) The number of youth aged seventeen through twenty-one residing in the labor market area served by the local educational agency who are unemployed (maximum 12 points);

(4) The percentage such youth represent, as compared with the vocational education enrollment in the local educational agency (maximum 12 points);

(5) The ability of the facility to comply with the standards adopted pursuant to the Architectural Barriers Act (maximum 5 points);

(Sec. 193(b)(1) (A) through (E); 20 U.S.C. 2443; 42 U.S.C. 4151 through 4156.)

(6) The need for the proposed facilities or equipment in relation to the employment needs of the State or labor market area (maximum 12 points);

(7) Adequacy of the proposed facilities or equipment for the training or educational requirements of the specific vocational training program(s) to be accommodated by the proposed facilities or equipment (in terms of linedrawings and educational specifications) (maximum 10 points);

(8) Evidence that the proposed renovation or remodeling or equipment is economical and is not elaborate or extravagant (maximum 5 points);

(9) Evidence that the planned renovation or remodeling is a more cost-effective approach than replacement (maximum 5 points); and

(10) Evidence that the local educational agency does not have the financial ability to undertake the proposed project without Federal assistance, and the ability of the State education agency and the local education agency to match proposed Federal funds (maximum 10 points).

(Implements, Sec. 192(b)(1); 20 U.S.C. 2442.)

(c) In approving applications, the Commissioner will consider the degree to which the modernization of facilities and equipment proposed in the application affords promise of achieving the goals set forth in the approved five-year State plan.

(Sec. 193(b)(2); 20 U.S.C. 2443.)

§ 105.506 Payments to local educational agencies.

(a) The Commissioner will pay 75 percent (except as noted in paragraph (b)) of the cost of approved applications in the order they are ranked under § 105.505(b).

(Sec. 193(c); 20 U.S.C. 2443.)

(b) The Commissioner may waive the 75 percent limit and may pay up to the full cost of the project upon the Commissioner's finding, in writing, that a local educational agency with an approved application is suffering from extreme financial need and cannot, because of the 75 percent limit, participate in the program.

(Sec. 193(e); 20 U.S.C. 2443.)

(c) Applications will be funded until the appropriation is exhausted.

(d) The Commissioner will reserve from the appropriation for the fiscal year for which the application is made an amount sufficient to pay the entire Federal share of each approved project and will obligate that amount from the appropriation even though the project may not be completed within the fiscal year.

(Interprets Sec. 194(a); 20 U.S.C. 2444.)

(e) The Commissioner will pay approved applicants in advance or by way of reimbursement, or in installments consistent with HEW practices.

(Sec. 194(b); 20 U.S.C. 2444.)

§ 105.507 Construction requirements.

The Office of Education's regulations for the Commissioner's direct project grant and contract programs (45 CFR Part 100a shall apply to projects for assistance under this program, particularly the Commissioner's regulations on "Bonding and Insurance" (45 CFR Part 100a, Subpart J, §§ 100a.120-122) and on "Construction Requirements" (Subpart K, §§ 100a.155-192), (45 CFR Part 100a). In addition, the non-discrimination provisions in 45 CFR Part 80 apply. This includes 45 CFR 80.3(b)(3) which provides that, in determining the site or location of the facility, a recipient may not make selections with the effect of excluding individuals from, denying them the bene-

fits of, or subjecting them to discrimination on the grounds of race, color, or national origin.

(Implements Sec. 193; 20 U.S.C. 2443.)

Subpart 5—Bilingual Vocational Education

BILINGUAL VOCATIONAL TRAINING PROGRAM

§ 105.601 Purpose.

The purpose of the bilingual vocational training program is to prepare persons of limited English-speaking ability to perform adequately in an environment requiring English language skills and to fill the critical need for more and better trained persons in occupational categories vital to both the persons and the economy. Funds available to the Commissioner pursuant to section 183 of the Act may be used for making grants or contracts for bilingual vocational training programs.

(Sec. 181; 20 U.S.C. 2411; Conf. Rept. No. 94-1701, p. 228.)

§ 105.602 Eligible programs.

Sixty-five percent of the funds available under section 183 of the Act may be used by the Commissioner to award grants or contracts for the cost of operating programs designed to carry out the purposes set forth in § 105.601 in an amount equal to the total sum expended by the applicant for the purposes set forth in the application. No cost sharing is required. These programs include:

(a) Bilingual vocational training programs for persons who have completed or left elementary or secondary school. Programs for secondary school students are not eligible;

(b) Bilingual vocational training programs for persons who have already entered the labor market and who desire or need training or retraining to achieve year-round employment, adjust to changing employment needs, expand their range of skills, or advance in employment.

Training allowances for participants in bilingual vocational training programs described in paragraphs (a) and (b) of this section are an allowable cost. Allowances are subject to the same conditions and limitations as set forth in the Department of Labor Regulations 29 CFR 95.34. Applicants may waive training allowances in accordance with the waiver procedure in 29 CFR 95.34(j).

(Sec. 185; 20 U.S.C. 2415.)

§ 105.603 Eligible applicants.

The following agencies or institutions are eligible for grants or contracts, except item (f) being eligible only for contracts:

(a) Local educational agencies;

(b) State agencies;

(c) Postsecondary educational institutions;

(d) Private nonprofit vocational training institutions; and

(e) Nonprofit educational or training organizations especially created to serve a group whose language as normally used is other than English; and

(f) Private for profit agencies and organizations.

(Sec. 184; 20 U.S.C. 2414.)

§ 105.604 Applications for grants or contracts.

(a) An applicant shall submit a copy of the application to the State board at the same time it is submitted to the Office of Education. The State board shall submit its comments to the Office of Education within 30 days after the closing date for applications.

(b) An applicant shall provide an assurance that the activities and services for which assistance is sought will be administered by or under the supervision of the applicant.

(c) An applicant shall set forth a bilingual vocational training program of such size, scope, and design as will make a substantial contribution toward carrying out the purposes described in § 105.601.

(d) An applicant shall provide an assurance that the program will include instruction in the English language and in the trainee's dominant language in order to insure that participants in the training will be assisted to pursue occupations in work environments where English is the language normally used.

(e) An applicant shall submit an amendment, if any, to the application in the same manner as the applicant submitted the original application. A request for funding by an applicant who has had a prior award(s) shall include an evaluation of the previous project and will be reviewed competitively with new applications.

(Sec. 184; 20 U.S.C. 2414; Sec. 189A(b); 20 U.S.C. 2420.)

§ 105.605 Review of applications.

(a) The Commissioner may approve an application for assistance under the bilingual vocational training program only if the application:

(1) Meets the requirements set forth in § 105.604;

(2) Is consistent with the criteria set forth in § 105.606; and

(3) Is submitted to the Commissioner at the time, in the manner and containing the information the Commissioner deems necessary, as set forth in the Notice of Closing Date to be published in the FEDERAL REGISTER.

(b) Prior to making awards in a State, the Commissioner will, where feasible, consult with the State board to achieve equitable distribution of assistance among populations of persons of limited English-speaking ability with the most acute need for training within the State.

(Sec. 189A, 189B(a)(3); 20 U.S.C. 2420, 2421.)

§ 105.606 Technical review criteria.

The Commissioner will use the following criteria in reviewing formally transmitted applications. These criteria are consistent with 45 CFR 100a.26, Review of Applications in the Office of Education, General Provisions for Programs. A segment or segments of an application should address each criterion. Each criterion is weighted and includes the maximum score that can be given to an application in relation to the criterion. The maximum score for the criteria is 100 points, and the maximum weight for each criterion is listed below. An application must receive a minimum of 30 points to be considered for funding.

(a) *Need.* (Maximum 10 points.)

(1) Describes the need for the proposed bilingual vocational training;

(2) Provides specific evidence of the need;

(3) Indicates specifically how the need will be met; and

(4) Describes, where appropriate, ongoing and planned activities in the community relative to the need.

(b) *Objectives.* (Maximum 10 points.)

(1) Are significant and meet clearly identified needs in bilingual vocational training;

(2) Clearly describe the proposed project outcomes; and

(3) Are capable of being measured and attained.

(c) *Plan.* (Maximum 15 points.) The plan clearly describes the way in which the objectives will be accomplished by:

(1) The overall design for the proposed project; and

(2) The specific procedures of each segment of the design. Normally the plan will include a description of:

(i) Proposed trainees;

(ii) Recruiting procedures to be used;

(iii) Training program including a description of both the bilingual vocational training and the language instruction which is designed to assure that trainees will acquire sufficient competency in English to work in environments where English is the language normally used;

(iv) Support services to be offered to trainees;

(v) Instructional materials to be used in the proposed program;

(vi) Anticipated level of skill of the trainees at the end of the proposed training;

(vii) Activities to be used in aiding trainees to secure employment, if appropriate; and

(viii) Tests to be used in the proposed program components.

(d) *Management plan.* (Maximum 8 points.) The management plan adequately describes the way in which personnel and resources will be used to accomplish each component of the plan developed in criterion (c).

(e) *Evaluation plan.* (Maximum 12 points.) The plan includes valid and reliable procedures for assessing and documenting the bilingual vocational training program and the progress of the trainees.

(f) *Applicant's staff competencies and experience.* (Maximum 25 points.) The application clearly describes:

(1) The names and qualifications (including project management qualifications) of the project director, professional staff, consultants, and advisory groups;

(2) Time commitments planned for the project director, staff, advisory groups, and any consultants;

(3) Evidence of past and successful experience of the proposed project director and key staff members in similar or related projects; and

(4) Staff competencies that are essential for the proposed project including proficiency in the language of the trainees.

(g) *Budget and cost effectiveness.* (Maximum 10 points.)

(1) The application provides a justifiable and itemized statement of cost which is substantiated by line items in the proposed budget and is cost effective;

(2) The application includes information concerning the average cost per trainee.

(h) *Institutional capability and commitment.* (Maximum 10 points.) The application provides adequate evidence of:

(1) Institutional experience and commitment to the proposed work;

(2) Appropriate facilities and equipment necessary for the proposed project; and

(3) Documented assurance of support from cooperating agencies, institutions, or community groups where applicable for successful implementation of the project.

(Implements Sec. 189A; 20 U.S.C. 2420.)

§ 105.607 Additional application review factors.

In addition to the criteria listed in § 105.606, the Commissioner may utilize factors such as the following in making decisions regarding whether to fund applications. (a) Duplication of effort; (b) Duplication of funding; and (c) Evidence that an applicant has not performed satisfactorily on previous projects.

(Implements Sec. 181; 20 U.S.C. 2411.)

BILINGUAL VOCATIONAL INSTRUCTOR TRAINING PROGRAM

§ 105.611 Purpose.

The purpose of the bilingual vocational instructor training program is to provide training programs to meet the critical shortage of instructors possessing both the job knowledge and skills and the dual language capabilities required for adequate instruction of persons handicapped by their limited English-speaking ability. Funds available to the Commissioner pursuant to section 183 of the Act may be used for making grants or contracts for bilingual vocational instructor training programs.

(Sec 186; 20 U.S.C. 2416.)

§ 105.612 Eligible programs.

Twenty-five percent of the funds available under section 183 of the Act may be used by the Commissioner to award grants or contracts for the cost of conducting training for instructors of bilingual vocational training programs in an amount equal to the total sum expended by the applicant for the purposes set forth in that application. No cost sharing is required. These programs include:

(a) Pre-service training programs designed to prepare persons to participate in bilingual vocational training or bilingual vocational education as: (1) Instructors; (2) Aides; and (3) Ancillary personnel such as guidance personnel and counselors.

(b) In-service and developmental programs designed to enable instructional and ancillary personnel to continue to improve their qualifications while participating in bilingual vocational training programs; fellowships or traineeships for persons engaged in activities described in (a) and (b) are an allowable cost. A fellowship is an award to an individual student made by a granting agency of the Department. A traineeship is an award to an institution for student support (stipends or allowances) and for institutional support (either in a predetermined amount or based on actual costs).

(Sec. 186; Sec. 187; 20 U.S.C. 2416; 20 U.S.C. 2417.)

§ 105.613 Eligible applicants.

The following categories of agencies or institutions are eligible for grants or contracts, except item (c) being eligible only for contracts: (a) State agencies; (b) Public and private nonprofit educational institutions; and (c) Private-for-profit educational institutions.

(Sec. 186; 20 U.SC. 2416.)

§ 105.614 Applications for grants or contracts.

(a) An applicant shall provide an assurance that the activities and services for which assistance is sought will be administered by or under the supervision of the applicant.

(b) An applicant shall set forth in the application a bilingual vocational instructor training program of a type described in § 165.612;

(c) An applicant shall describe in the application the capabilities of the applicant institution in terms of:

(1) A listing of the vocational training or vocational education courses offered by that institution;

(2) Appropriate accreditation by regional or national associations, if any;

(3) Approval by appropriate State agencies of the courses offered; and

(4) Qualifications of the principal staff who will be responsible for the training program.

(d) An application shall describe clearly (and in detail) in the application the trainees in terms of the:

(1) Minimum qualifications of the persons to be enrolled in the training program;

(2) Selection process of the trainees; and

(3) Amounts of fellowships or traineeships, if any, to be granted to the persons enrolled.

(e) An applicant shall submit an amendment, if any, to the application in the same manner as the applicant submitted the original application. A request for funding by an applicant who has had a prior award(s) shall include an evaluation of the previous project and will be reviewed competitively with new applications.

(Sec. 189A; 20 U.S.C. 2420.)

§ 105.615 Review of applications.

(a) The Commissioner may approve an application for assistance under the bilingual vocational instructor training program only if the application:

(1) Meets the requirements set forth in § 105.614;

(2) Is consistent with the criteria set forth in § 105.616;

(3) Is submitted to the Commissioner at the time, in the manner and containing the information the Commissioner deems necessary, as set forth in the Notice of Closing Date to be published in the FEDERAL REGISTER.

(4) The applicant institution actually has an ongoing vocational training program in the field in which persons are being trained; and

(5) The applicant institution can provide instructors with adequate language capabilities in the language other than English to be used in the bilingual vocational training program for which persons are being trained.

(b) Prior to making awards in a State, the Commissioner will, where feasible, consult with the State board to achieve equitable distribution of assistance among populations of persons of limited English-speaking ability with the most acute need for training within the State.

(Secs. 189A, 189B(a)(3); 20 U.S.C. 2420, 2421.)

§ 105.616 Technical review criteria.

The Commissioner will use the following criteria in reviewing formally transmitted applications. These criteria are consistent with 45 CFR 100.26, Review of Applications in the Office of Education, General Provisions for Programs. A segment or segments of an application should address each criterion. Each criterion is weighted and includes the maximum score that can be given to an application in relation to the criterion. The maximum score for the criterion is 100 points, and the maximum weight for each criterion is listed below. An application must receive a minimum of 30 points to be considered for funding.

(a) *Need.* (Maximum 10 points) The need section clearly: (1) Describes the need for the proposed instructor training; (2) Provides specific evidence of the need; (3) Indicates specifically how the need will be met; and (4) Describes, where appropriate, ongoing and planned activities in the community relative to the need.

(b) *Objectives.* (Maximum 10 points) The objectives are related to the problem and: (1) Are significant for pre-service or in-service training; (2) Clearly describe the proposed training program; and (3) Are capable of being measured and attained.

(c) *Plan.* (Maximum 15 points) The plan clearly describes the way in which the objectives will be accomplished by the: (1) Overall design for the proposed

project; (2) Specific procedures of each segment of the design in terms of accomplishing the objectives; (3) Normally the plan will include:

(i) Description of the training program, including all program components;

(ii) Description of the minimum qualifications of the persons to be enrolled in the training program;

(iii) Description of the selection process and the amounts of the fellowships or traineeships, if any, to be granted to persons enrolled in the program;

(iv) Evidence that the applicant institution actually has an ongoing vocational training or vocational education program in the field for which persons are to be trained, including a listing of the vocational courses offered by the institutions;

(v) Evidence that the applicant institution can provide instructors with adequate language capabilities in the language other than English to be used in the bilingual job training program for which the persons are being trained; and

(vi) Evidence that a need exists for instructors who will receive training in the proposed project.

(d) *Management plan.* (Maximum 8 points) The management plan adequately describes the way in which personnel and resources will be used to accomplish each component of the plan developed in criterion (c).

(e) *Evaluation plan.* (Maximum 12 points) The plan includes rigorous procedures for assessing and documenting the instructor training program including both the vocational component and the language component.

(f) *Applicant's staff competencies and experience.* (Maximum 25 points) The application clearly describes:

(1) The names and qualifications (including project management qualifications) of the project director, professional staff, consultants, and advisory groups;

(2) Time commitments planned for the project director, key staff, advisory groups, and any consultants;

(3) Evidence of past and successful experience of the proposed project director and key staff members in similar or related projects; and

(4) Staff competencies that are essential for the proposed project, including proficiency in English and in the language other than English.

(g) *Budget and cost effectiveness.* (Maximum 10 points.) The application provides a justifiable and itemized statement of cost which is substantiated by line items in the proposed budget and appears to be cost effective.

(h) *Institutional capability and commitment.* (Maximum 10 points.) The application provides adequate evidence of:

(1) Institutional experience and commitment to the proposed work;

(2) Appropriate facilities and equipment necessary for the proposed project;

(3) Appropriate accreditation of the applicant institution by regional or national associations and approval by appropriate State agencies of the courses offered; and

(4) Documented assurance of support from cooperating agencies, institutions, or community groups where applicable for successful implementation of the project.

(Implements Sec. 189A; 20 U.S.C. 2420.)

§ 105.617 Additional application review factors.

In addition to the criteria listed in § 105.616, the Commissioner may utilize factors such as the following in making decisions regarding whether to fund applications.

(a) Duplication of effort;

(b) Duplication of funding; and

(c) Evidence that an applicant has not performed satisfactorily on previous projects.

(Implements Sec. 181; 20 U.S.C. 2411.)

Bilingual Vocational Instructional Materials, Methods, and Techniques Program

§ 105.621 Purpose.

The purpose of the bilingual vocational instructional materials, methods, and techniques program is to develop instructional materials and encourage research programs and demonstration projects to meet the critical shortage of such instructional materials suitable for bilingual vocational training programs. Funds available to the Commissioner pursuant to section 183 of the Act may be used for making grants or contracts for bilingual vocational instructional materials, methods, and techniques.

(Sec. 188; 20 U.S.C. 2418.)

§ 105.622 Eligible programs.

Ten percent of the funds available under section 183 of the Act may be used by the Commissioner to award grants or contracts for the cost of developing and testing instructional materials, methods, or techniques for bilingual vocational training in an amount equal to the total sum expended by the application for the purposes set forth in that application. No cost sharing is required. These programs include:

(a) Research in bilingual vocational training;

(b) Development of instructional materials;

(c) Training programs designed to familiarize State agencies and training institutions with research findings and successful pilot and demonstration projects in bilingual vocational training;

(d) Experimental, developmental, and pilot programs and projects designed to test the effectiveness of research findings; and

(e) Other demonstration and dissemination projects in bilingual vocational training.

(Sec. 189; 20 U.S.C. 2419.)

§ 105.623 Eligible applicants.

The following categories of agencies or institutions are eligible for grants or contracts, except items (e) and (f) being eligibile only for contracts: (a) State agencies; (b) Public educational institutions; (c) Private educational institutions; (d) Nonprofit organizations; (e) Private-for-profit organizations; and (f) Individuals.

(Sec. 188; 20 U.S.C. 2418.)

§ 105.624 Applications for grants or contracts.

(a) An applicant shall provide an assurance that the activities and services for which assistance is sought will be administered by or under the superivision of the applicant.

(b) An applicant shall set forth in the application a bilingual vocational instructional materials, methods, and techniques program of a type described in § 105.622.

(c) An applicant shall set forth in the application the qualifications of the staff who will be responsible for the program for which assistance is sought.

(d) An applicant shall submit an amendment, if any, to the application in the same manner as the applicant submitted the original application. A request for funding by an applicant who has had a prior award(s) will be reviewed competitively with new applications.

(Sec. 189A; 20 U.S.C. 2420.)

§ 105.625 Review of applications.

The Commissioner may approve an application for assitance under the bilingual vocational instructional materials, methods, and techniques program only if the application:

(a) Meets the requirements set forth in § 105.624;

(b) Is consistent with the criteria set forth in 105.626; and

(c) Is submitted to the Commissioner at the time, in the manner and containing the information the Commissioner deems necessary, as set forth in the Notice of Closing Date to be published in the Federal Register.

(Sec. 189A; 20 U.S.C. 2420.)

§ 105.626 Technical review criteria.

The Commissioner will use the following criteria in reviewing formally transmitted applications. These criteria are consistent with 45 CFR 100a.26, Review of Applications in the General Provisions for Office of Education Programs. A segment or segments of an application should address each criterion. Each criterion is weighted and includes the maximum score that can be given to an application in relation to the criterion. The maximum score for the criteria is 100 points, and the maximum weight for each criterion is listed below. An application must receive a minimum score of 50 points to be considered for funding.

(a) *Need.* (Maximum 20 points) The need section clearly:

(1) Describes the national significance and the need in bilingual vocational training for the proposed project;

(2) Provides specific evidence of the need;

(3) Indicates specifically who or what will be helped; and

(4) Describes the problem rather than the symptoms of the problem.

(b) *Literature review.* (Maximum 5 points) The literature review is sufficiently comprehensive to:

(1) Establish the basis for the problem;

(2) Describe the problem in contrast to the symptoms of the problem;

(3) Provide a strong conceptual framework for the proposed objectives and proposed plan, including the general design and specific procedures of the proposed plan, along with the management, evaluation, dissemination, and training procedures (when appropriate); and

(4) Describe what has been done previously to alleviate the problem and point out the gaps that will be alleviated by this specific proposed work.

(c) *Objectives.* (Maximum 10 points) The objectives are related to the problem and: (1) Are significant for bilingual vocational training; (2) Clearly describe proposed project outcomes; (3) Are capable of being attained; and (4) Are measurable.

(d) *Plan.* (Maximum 15 points) The plan clearly describes:

(1) The overall design for the proposed project; and

(2) The specific procedures by which each objective will be accomplished. Normally the plan will include:

(i) Precise definitions of terms; (ii) Description of the characteristics and number of subjects; (iii) Sampling procedures and control groups; (iv) Instrumentation; and (v) Statistical and analytical procedures.

(e) *Management plan.* (Maximum 10 points). The management plan adequately describe the way in which personnel and resources will be used to accomplish each component of the plan developed in criterion (c).

(f) *Evaluation plan.* (Maximum 10 points.) The plan includes rigorous procedures for assessing and documenting the impact of project results and end products or outcomes in terms of the achievement of project goals and objectives.

(g) *Results, end products, outcomes, and dissemenation.* (Maximum 10 points.) The application clearly describe:

(1) What will be delivered to the government;

(2) The format in which the results, products, or outcomes will be delivered to the government;

(3) The way in which results, products, or outcomes will be developed or provided for dissemenation purposes to specified user populations, and

(4) The procedures to be used in disseminating the results, and products, or outcomes at the local, State, and/or national levels.

(h) *Applicant's staff competencies and experience.* (Maximum 10 points.) The application clearly describes:

(1) The names and qualifications (including project management qualifications) of the project director, key professional staff, advisory groups, and consultants;

(2) Time commitments planned for the project by the project director, key staff, advisory groups, and consultants;

(3) Evidence of past and successful experience of the proposed project director and key staff members in similar or related projects; and

(4) The competencies that are required for the proposed project.

(i) *Budget and cost effectiveness.* (Maximum 5 points.) The application provides a justifiable and itemized statement of cost which is substantiated by line items in the proposed budget and appears to be cost effective with respect to proposed results, products, or outcomes.

(j) *Applicant's capability and commitment.* (Maximum 5 points.) The application provides adequate evidence of:

(1) Institutional or individual's experience and commitment to the proposed work;

(2) Appropriate facilities and equipment; and

(3) Documented assurance of support from cooperating agencies, local educational agencies or postsecondary institutions, business, industry, and labor, where applicable for successful implementation of the project.

(Implements Sec. 189A; 20 U.S.C. 2420.)

§ 105.627 Additional application review factors.

In addition to the criteria listed in § 105.626, the Commissioner may utilize factors such as the following in making decisions regarding whether to fund applications.

(a) Duplication of effort;

(b) Duplication of funding; and

(c) Evidence that an applicant has not performed satisfactorily on previous projects.

(Implements Sec. 181; 20 U.S.C. 2411.)

APPENDIX A

DEFINITIONS

"Act" means the Vocational Education Act of 1963, Pub. L. 88-210, as amended by Title II of the Education Amendments of 1976, Pub. L. 94-482, 90 Stat. 2168, 20 U.S.C. 2301 et seq.

(Secs. 101-195, 20 U.S.C. 2301 et seq.)

"Administration" means activities of a State or an eligible recipient necessary for the proper and efficient performance of its duties under the Act, including supervision, but not including ancillary services.

(Sec. 195(20); 20 U.S.C. 2461.)

"Adult program" means (for reporting purposes) vocational education for persons who have already entered the labor market or who are unemployed or who have completed or left high school and who are not described in the definition of "postsecondary program."

(Sec. 110(c); 20 U.S.C. 2461.)

"Ancillary services" means activities which contribute to the enhancement of quality in vocational education programs, including activities such as teacher training and curriculum development, but excluding administration (except in consumer and homemaking education under Section 150 of the Act).

(Implements Sec. 195(20); 20 U.S.C. 2461.)

"Area vocational education school" means:

(a) A specialized high school used exclusively or principally for the provision of vocational education to persons who are available for study in preparation for entering the labor market;

(b) The department of a high school exclusively or principally used for providing vocational education in no less than five different occupational fields to persons who are available for study in preparation for entering the labor market; or

(c) A technical or vocational school used exclusively or principally for the provision of vocational education to persons who have completed or left high school and who are available for study in preparation for entering the labor market; or

(d) The department or division of a junior college or community college or university operating under the policies of the State board which provides vocational education in no less than five different occupational fields, leading to immediate employment but not necessarily leading to a baccalaureate degree, if:

(1) The vocational programs are available to all residents of the State or an area of the State designated and approved by the State board; and

(2) In the case of a school, department, or division described in (c) or (d), it admits as regular students both persons who have completed high school and persons who have left high school.

(Sec. 195(2); 20 U.S.C. 2461.)

"Bilingual vocational training" means training or retraining in which instruction is presented in both the English language and the dominant language of the persons receiving training and which is conducted as part of a program designed to prepare individuals of limited English-speaking ability for gainful employment as semiskilled or skilled workers or technicians or subprofessionals in recognized occupations and in new and emerging occupations, but excluding any program to prepare individuals for employment in occupations which require a baccalaureate or advanced degree; bilingual vocational training includes guidance and counseling (either individually or through group instruction) in connection with such training or for the purpose of facilitating occupational choices; instruction related to the occupation or occupations for which the students are in training or instruction necessary for students to benefit from such training; the training of persons engaged as, or preparing to become, instructors in a bilingual vocational training program; and the acquisition, maintenance, and repair of instructional supplies, aids, and equipment, but such term does not include the construction, acquisition, or initial equipment of buildings or the acquisition or rental of land. (Implements Sec. 181; 20 U.S.C. 2411)

"CETA" means the Comprehensive Employment and Training Act of 1973, Pub. L. 93-23, 87 Stat. 839, as amended.

"Commissioner" means the U.S. Commissioner of Education or the Commissioner's designee.

(Sec. 195(5); Sec. 421A(a) of GEPA; 20 U.S.C. 2461.)

"Construction" includes:

(a) Construction of new buildings;

(b) Acquisition, expansion, remodeling, and alteration of existing buildings;

(c) Site grading and improvement; and

(d) Architect fees.

(Sec. 195(4); 20 U.S.C. 2461.)

"Cooperative education" means a program of vocational education for persons who, through written cooperative arrangements between the school and employers, receive instruction, including required academic courses and related vocational instruction by alternation of study in school with a job in any occupational field, but these two experiences must be planned and supervised by the school and employers so that each contributes to the student's education and to his or her employability. Work periods and school attendance may be on alternate half days, full days, weeks, or other periods of time in fulfilling the cooperative program.

(Sec. 195(18); 20 U.S.C. 2461.)

"Curriculum materials" means materials:

(a) Covering instruction in a course or series of courses in any occupational field; and

(b) Designed to prepare persons for employment at the entry level; or

(c) Designed to upgrade occupational competencies of those previously or presently employed in any occupational field.

(Sec. 195(19); 20 U.S.C. 2461.)

"Disadvantaged" means:

(a) Persons (other than handicapped persons) who:

(1) Have academic or economic disadvantages; and

(2) Require special services, assistance, or programs in order to enable them to succeed in vocational education programs.

(Sec. 195(16); 20 U.S.C. 2461.)

(b) "Academic disadvantage," for the purposes of this definition of "disadvantaged," means that a person:

(1) Lacks reading and writing skills;

(2) Lacks mathematical skills; or

(3) Performs below grade level.

(c) "Economic disadvantage," for the purposes of this definition of "disadvantaged," means:

(1) Family income is at or below national poverty level;

(2) Participant or parent(s) or guardian of the participant is unemployed;

(3) Participant or parent of participant is recipient of public assistance; or

(4) Participant is institutionalized or under State guardianship.

(Interprets Sec. 195(16); 20 U.S.C. 2461.)

"Eligible recipient" means:

(a) A local educational agency, or

(b) A postsecondary educational institution.

(Sec. 195(13); 20 U.S.C. 2461.)

"Financial ability," as used in section 106(a)(5)(B)(i) of the Act means the property wealth per capita of local school districts and of other public agencies having a tax base or the total tax effort of the area served by these schools and agencies as that effort is a percentage of the income per capita of those within the taxing body.

(Implements Sec. 106(a)(5)(B)(i); 20 U.S.C. 2306; H. Rept. No. 94-1085, p. 34.)

"Handicapped" means:

(a) A person who is:

(1) Mentally retarded;

(2) Hard of hearing;

(3) Deaf;

(4) Speech impaired;

(5) Visually handicapped;

(6) Seriously emotionally disturbed;

(7) Orthopedically impaired; or

(8) Other health impaired person, or persons with specific learning disabilities; and

(b) Who, by reason of the above:

(1) Requires special education and related services, and

(2) Cannot succeed in the regular vocational education program without special educational assistance; or

(3) Requires a modified vocational education program.

(Sec. 195(7), Sec. 602(1) of the Education of Handicapped Act; 20 U.S.C. 2461; 20 U.S.C. 4001.)

"HEW" means the Department of Health, Education, and Welfare.

(42 U.S.C. 3501.)

"High school program" means vocational education for persons in grades 9 through 12.

(Implements Sec. 101; 20 U.S.C. 2461.)

"Industrial arts education programs" means those education programs:

(a) Which pertain to the body of related subject matter, or related courses, organized for the development of understanding about all aspects of industry and technology, including learning experiences involving activities such as experimenting, designing, constructing, evaluating, and using tools, machines, materials, and processes; and

(b) Which assist individuals in making informed and meaningful occupational choices or which prepare them for entry into advanced trade and industrial or technical education programs.

(Sec. 195(15); 20 U.S.C. 2461.)

"Institution of higher education" means institution of higher education as defined in section 1201(a) of the Higher Education Act.

(Sec. 1201(a) of the Higher Education Act, 20 U.S.C. 1141(a).)

"Limited English-speaking ability" when used in reference to an individual means:

(a) Individuals who were not born in the United States or whose native tongue is a language other than English, and

(b) Individuals who came from environments where a language other than English is dominant, and by reasons thereof, have difficulties speaking and understanding instruction in the English language.

(20 U.S.C. 880b-1.)

"Local educational agency" means:

(a) A board of education (or other legally constituted local school authority) having administrative control and direction of public elementary or secondary schools in a city county, township, school district, or political subdivision of a State; or

(b) Any other public educational institution or agency having administrative control and direction of a vocational educational program.

(Sec. 195(10); 20 U.S.C. 2461.)

"Low-income family or individual" means families or individuals who are determined to be low-income according to the latest available data from the Department of Commerce.

(Sec. 195(17); 20 U.S.C. 2461.)

"National Advisory Council" (NACVE) means the previously existing National Advisory Council on Vocational Education which is continued by section 162 of the Act.

(Sec. 195(14); 20 U.S.C. 2461.)

"Postsecondary educational institution" means a nonprofit institution legally authorized to provide postsecondary education within a State for persons sixteen years of age or older, who have graduated from or left elementary or secondary school.

(Sec. 195(12); 20 U.S.C. 2461.)

"Postsecondary program" means (for reporting purposes) vocational education for persons who have completed or left high school and who are enrolled in organized programs of study for which credit is given toward an associate or other degree, but which programs are not designed as baccalaureate or higher degree programs.

(Sec. 110(c); 20 U.S.C. 2310.)

"Private vocational training institution" means a business or trade school, or technical institution or other technical or vocational school, in any State, which (a) admits as regular students only persons who have completed or left elementary or secondary school and who have the ability to benefit from the training offered by such institution; (b) is legally authorized to provide, and provides within that State, a program of postsecondary vocational or technical education designed to fit individuals for useful employment in recognized occupations; (c) has been in existence for two years or has been specially accredited by the Commissioner as an institution meeting the other requirements of this subsection; and (d) is accredited (1) by a nationally recognized accrediting agency or association listed by the Commissioner pursuant to this clause, or (2) if the Commissioner determines that there is no nationally recognized accrediting agency or association qualified to accredit schools of a particular category, by a State agency listed by the Commissioner pursuant to this clause, or (3) if the Commissioner determines that there is no nationally recognized or State agency or association qualified to accredit schools of a particular category, by an advisory committee appointed by him and composed of persons specially qualified to evaluate training provided by schools of that category, which committee shall prescribe the standards of content, scope, and quality which must be met by those schools and shall also determine whether particular schools meet those standards. For the purpose of this paragraph, the Commissioner shall publish a list of nationally recognized accrediting agencies or associations and State agencies which he determines to be reliable authority as to the quality of education or training afforded." (Pub. L. 95-40; 20 U.S.C. 2461(21).)

"School facilities" means:

(a) Classrooms and related facilities (including initial equipment) and interests in lands on which such facilities are constructed.

(b) "School facilities" does not include any facility intended primarily for events for which admission is to be charged to the general public.

(Sec. 195(3); 20 U.S.C. 2461.)

"Secondary program" means vocational education for persons in secondary grades as defined by State law.

(Implements Sec. 101; 20 U.S.C. 2301.)

"Secretary" means the Secretary of Health, Education, and Welfare.

(Sec. 195(6); 20 U.S.C. 2461.)

"State" includes:

(a) The 50 States;

(b) The District of Columbia;

(c) The Commonwealth of Puerto Rico;

(d) The Virgin Islands;

(e) Guam;

(f) American Samoa; and

(g) The Trust Territory of the Pacific Islands.

(Sec. 195(8); 20 U.S.C. 2461.)

"State board" means the State board designated or created by State law as the sole State agency responsible for:

(a) The administration of vocational education; or

(b) Supervision of the administration of vocational education in the State.

(Sec. 195(9); 20 U.S.C. 2461.)

"State educational agency" (SEA) means:

(a) The State board of education; or

(b) Other agency or office primarily responsible for the State supervision of public elementary and secondary schools; or

(c) If there is no such office or agency, an office or agency designated by the Governor or by State law.

(Sec. 195(11); 20 U.S.C. 2461.)

"Vocational education" means organized educational programs which are directly related to the preparation of individuals for paid or unpaid employment, or for additional preparation for a career requiring other than a baccalaureate or advanced degree; for purposes of this paragraph, the term "organized education program" means only:

(a) Instruction related to the occupation or occupations for which the students are in training or instruction necessary for students to benefit from such training; and

(b) The acquisition, maintenance, and repair of instructional supplies, teaching aids and equipment.

The term "vocational education" does not mean the construction, acquisition, or initial equipment of buildings, or the acquisition or rental of land.

(Sec. 195(1); 20 U.S.C. 2461.)

"Vocational instruction" means instruction which is designed to prepare individuals upon its completion for employment in a specific occupation or cluster of closely related occupations in an occupational field, and which is especially and particularly suited to the needs of those engaged in or preparing to engage in such occupation or occupations. Such instruction may include:

(a) Classroom instruction;

(b) Classroom related field, shop, and laboratory work;

(c) Programs providing occupational work experiences, including cooperative education and related instructional aspects of apprenticeship programs;

(d) Remedial programs which are designed to enable individuals to profit from instruction related to the occupation or occupations for which they are being trained by correcting what ever educational deficiencies or handicaps prevent them from benefiting from such instruction; and

(e) Activities of vocational student organizations which are an integral part of the vocational instruction, subject to the provisions in § 104.513.

(Implements Sec. 120(b)(1)(A); 195(1); 20 U.S.C. 2330, 2461.)

APPENDIX B

QUESTIONS AND ANSWERS

Many specific questions were raised by interested persons with respect to the implementation of the Act. Some of these issues raise important policy considerations and have legal significance. Recognizing that the goal of a uniform position on these issues can best be achieved through publication in the FEDERAL REGISTER, the Commissioner has decided to issue the following questions and answers as supplementary information to the regulation.

Question No. 1: To what part of the Act does the section 106(a)(5) funding formula apply?

Answer: The section 106(a)(5) funding formula must be applied to all Federal funds distributed under sections 120, 134, 140 and 150. In addition, certain parts of the Act impose other special funding criteria, priorities, and conditions which must be considered. For example, both the work study program (section 121) and cooperative vocational education program (section 122) require that priority in funding be given to areas of high youth dropouts or youth unemployment.

Question No. 2: Is it permissible for the State education agency (SEA) to contract with another agency to fulfill the requirement of full-time personnel being assigned to work to eliminate sex discrimination and sex stereotyping?

Answer: The SEA may contract for personnel to assist the State board in this capacity, but the contract must specify that the personnel will work full-time to eliminate sex discrimination and sex stereotyping from vocational education programs by performing the functions listed in § 104.75. If the personnel are hired under contract, the State agency is as responsible for the performance of the personnel as it would be if the personnel were employed directly by the State board.

Question No. 3: What should the qualifications be of the full-time personnel to eliminate sex bias, sex discrimination, and sex stereotyping?

Answer: Section 104.72(b) requires the State to match the qualifications of the applicants with the responsibilities of the job. The responsibilities are set forth in § 104.75. In addition, the person selected should have a demonstrated commitment to the elimination of sex bias, sex discrimination, and sex stereotyping.

Question No. 4: How can a State department of education legally monitor the personnel practices of local educational agencies who are, for all practical purposes, autonomous?

Answer: Section 104(b)(1) of the Act requires that the full-time personnel to eliminate sex bias monitor the implementation of laws prohibiting sex discrimination. In a State where the local educational agencies have a great deal of autonomy and the State personnel have no authority to enforce changes, the LEA should have no objection to the full-time personnel visiting to observe their personnel practices, make suggestions, and report violations of Titles VI and IX.

Question No. 5: Does the certification contained in § 104.171(g) detract from the requirements in § 104.75(j) which require the full-time personnel to review and submit recommendations on the State plan?

Answer: No. The certification in § 104.171 (g) does not preclude inclusion of any comments the full-time personnel wish to make. Under § 104.75 (h) and (j), the full-time personnel must make information readily available to the State board and the Commissioner and must review the State plan and submit recommendations on it. Comments on the State plan may be submitted with the certification or at any other convenient time.

Question No. 6: May a vocational education student be appointed to the State advisory council pursuant to section 105(a)(20) of the Act even though the individual will no longer be a student after two years?

Answer: Yes. Since members of the advisory council must be appointed for terms of three years, an appointment held by a student who is involved in vocational education for a maximum of two years would become vacant after the individual's status as a student expired. The appointing body, therefore, would be required to fill the vacancy for the unexpired term (§ 104.92(c)(2)).

Question No. 7: Must the annual program plan provide information on the allocation of Federal funds to each eligible recipient?

Answer: Yes. Section 108(b)(1)(B)(ii) of the Act provides that the annual program plan must "set out explicitly the proposed distribution of such funds among eligible recipients."

Question No. 8: Are there any complaint procedures available to parents, students, and other individuals to the State education agency?

Answer: Although the Act does not require the State to adopt a formal grievance procedure for parents, students, and other individuals, the State may wish to develop procedures for resolving these complaints. These procedures might include specific time limits for investigation and resolution of complaints, an opportunity for the complainant to present evidence to the State educational agency, and the dissemination of information concerning these procedures. In addition, the complaint procedure for violations of Title IX are contained in 45 CFR 86.8(b).

Question No. 9: How must the State make the five-year plan and annual program plan reasonably available to the public in accordance with section 106(a)(9)?

Answer: The State should make the plans readily available in places such as libraries, community colleges, and local school districts. With regard to members of the general public requesting copies of the plans, the State may wish to follow the standards and fee schedule of the Department's regulations under the Federal Freedom of Information Act (Pub. L. 90-23, 45 CFR Part 5).

Question No. 10: At what stage must the State make the plans available to the public?

Answer: Since the public must have some familiarity with the content of the planning documents prior to the public hearing the State should make drafts of the plans available prior to the public hearings.

Question No. 11: When will the Commissioner make the State plans available to the public?

Answer: Under the Department's Freedom of Information Regulations (45 CFR Part 5), "State plan material" is specifically listed in the Appendix as "Generally Available." This means that State plans sent or delivered to the Office of Education, or letters relating thereto, will be available. Therefore, both the five-year State plan and annual program plan will be available to members of the public, on request for the document, as soon as the document is received by the Office of Education in a regional office or the central office. The document will be available on receipt, before the Commissioner's review or approval.

Question No. 12: If the State legislature supports the entire cost (other than tuition payments) of operation of postsecondary area vocational schools, how would the relative financial ability of the institution be established pursuant to section 106(a)(5)(B)(i) of the Act?

Answer: An institution with no local tax base for support would have to calculate its relative financial ability on the amount of funds the State legislature makes available to it.

Question No. 13: Two commenters questioned the appropriateness of participants (other than those representatives specified in section 107(a)(1)) being involved in the development of the peon.

Answer: While a State may involve other participants, only one member of each of the designated agencies, councils, and individuals specified in section 107(a)(1) of the Act may be involved in the development of the peon.

Question No. 14: May the State board design the membership of the section 107 planning group in such a way that the State educational agency's personnel constitute a majority of the voting membership?

Answer: Membership on the planning group is limited to one official representative for each of the agencies, councils, and individual categories specified in section 107(a)(1) of the Act. One person may be the State agency's representative for more than one of the ten categories if that State agency has multi-responsibility. There is, however, no requirement for a vote by each representative.

Question No. 15: Should CETA be included "among the various institutions of the State" under section 107(b)(2)(A)?

Answer: No. CETA is not an institution for purposes of § 107(b)(2)(A). Through the coordination efforts in § 104.188 the State board will have data on programs conducted under CETA and will consider these data in its planning.

Question No. 16: What basis should the State use to determine if a shift in funding for programs in secondary schools has occurred in accordance with § 104.315?

Answer: The State should rely on the 601T forms submitted to the Office of Education for fiscal years 1975 and 1976. These reports should specify the amounts spent at the secondary level. If projected Federal expenditures for programs in secondary schools in either fiscal year 1978 or 1979 are not within 95 percent of the figures reported for fiscal years 1975 or 1976, then a justification must be set forth in the five-year State plan.

Question No. 17: How may a State comply with the section 107(a)(2) and section 108(a)(2) requirement to provide sufficient public notice for public hearings on the five-year plan and annual program plans?

Answer: The State should mail invitations to organizations and individuals in the State having an interest in vocational education and civil rights, publish notices of the hearings in major newspapers, and place announcements on television and radio as appropriate throughout the State, beginning 30 days prior to the hearings.

Question No. 18: Must the section 110 minimum percentages for the national priority programs (handicapped, disadvantaged, postsecondary) be computed against the allotment under section 102(a) prior to the 80/20 split for subparts 2 and 3?

Answer: No. Regardless of whether the computation is made prior to or after the 80/20 division, the minimum percentages must be based on the total allocation, not just the 80 percent for subpart 2 or the 20 percent for subpart 3.

Question No. 19: Must the State pay exactly 50 percent, at least 50 percent, or up to 50 percent for the three national priority programs in section 110 of the Act?

Answer: The State must pay at least 50 percent of the cost of vocational education programs for the national priority programs in section 110 of the Act (§ 104.303).

Question No. 20: May a State use local funds earmarked for local administration as part of the State's matching share for State administration under section 111(a)(2)?

Answer: No. The State matching share must be earmarked for State administration, not local administration. The non-Federal source of funding for State administration, however, may be generated at either the State or local level.

Question No. 21: May a State use tuition fees to meet the statutory matching requirements?

Answer: No. In accordance with § 100b.58 of the General Education Provisions Regulations, tuition and fees collected may not be included as part of the Federal or non-Federal share of expenditures under any Federal program.

Question No. 22: Does the § 104.321 provision of maintenance of fiscal effort allow the State to use a per student basis one year and then change and use aggregated cost the next year?

Answer: Yes. The State may annually select either of the two bases. Local educational agencies and postsecondary institutions may also select either of the two bases.

Question No. 23: To determine maintenance of fiscal effort, will the Commissioner compare the amount between the present and previous year or between the preceding and second preceding year?

Answer: In accordance with § 104.322, the Commissioner will determine maintenance of effort by comparing the preceding year to the second preceding year.

Question No. 24: Are the evaluations of programs conducted by the State board available to the general public?

Answer: Yes. The annual accountability report, which is available to the public, must contain a summary of the evaluations of programs conducted by the State.

Question No. 25: What does the requirement in section 120(b)(2) of the Act that the State board make a specific finding in each instance of funding for stipends in section 120(b)(1)(G) of the Act pertain to?

Answer: Each eligible recipient in the State desiring to provide stipends to students shall include an assurance in its local application to the State board that students to receive stipends have acute economic needs which cannot be met due to inadequate funding in other programs (§ 104.573).

Question No. 26: Section 104.402 of the regulation gives the State board wide latitude and discretion in regard to the collection and reporting of data to evaluate the effectiveness of its programs. Will it be possible to aggregate across all States the data thus collected and meet the reporting requirements of section 112(b) of the Act?

Answer: Aggregation of the data on program completers and leavers required by section 112(b)(1)(B) of the Act will be assured by use of the uniform definitions and information elements and the instructions and standards required by §§ 104.404(d) and 104.405 of the regulation. As for the evaluation required by section 112(b)(1)(A) of the Act, it is the Commissioner's preference that, in view of the increased burden of evaluation under the new Act and the as yet undetermined nature of the new national reporting and accounting system mandated by section 161 of the Act, the State board should be given considerable latitude. After a year of experience with the new Act, it may be found desirable to reconsider the reporting requirements.

Question No. 27: What programs are eligible for funding under the assurance which specifies "of significant assistance to individuals enrolled in making an informed and meaningful occupational choice as an integral part of a program of orientation and preparation"? At what grade level may these programs be offered?

Answer: Prevocational or exploratory programs which are designed to be of significant assistance to individuals enrolled in making an informed and meaningful occupational choice may be funded under the Act. Specifically, programs in industrial arts may be supported with funds under section 120 of the Act beginning at the secondary level (as defined by the State). Exemplary and innovative programs under section 132, consumer and homemaking programs under section 150, and vocational guidance under section 134 may be provided at all levels.

Question No. 28: May subpart 3 funds for program improvement and support services be used for the programs for the special populations described in section 120(b)(1)(L)?

Answer: No. The program outlined in section 120(b)(1)(L) is included among the purposes of the subpart 2 basic grant and, therefore, must be funded under subpart 2.

Question No. 29: May a State satisfy the requirement in § 104.502(b) by providing regular vocational education programs without special courses or instruction in how to seek employment for the special populations listed in § 104.621?

Answer: No. The State must provide these special populations with vocational education programs which offer special instruction in how to seek employment and placement services for graduates.

Question No. 30: Is a correctional institution of the State eligible to receive funds?

Answer: Yes. Under section 195(13) only LEA's or post-secondary institutions are "eligible decipients." The State or eligible recipient may, however, enter into an arrangement with the agency administering correctional institutions for the provision of vocational training.

Question No. 31: May funds available for establishing day care centers be used for the establishment of centers in schools? May these centers also be used as a laboratory for training students for employment in child care occupations?

Answer: Yes. The day care centers may be established in the schools and may serve as a learning laboratory for training students for employment in child care occupations.

Question No. 32: May a State use section 130 funds to support research activities in LEA's?

Answer: Yes. Section 130 authorizes the Commissioner to allocate funds to the States for, among others, the purposes of section 131. Section 131(a) authorizes the State to support a research coordinating unit (RCU) for research by the RCU itself or for *contracts* by the RCU for research. Thus, the RCU may enter into a contract with the LEA for research.

Question No. 33: Does the Act require the State to match funds for research, or for exemplary projects, or curriculum development projects, on a program-by-program basis?

Answer: No. Section 111 of the Act does not require a program-by-program matching by the State in programs under sections 130, 131, 132, or 133. See § 104.302 of the regulation as to matching on a State-wide basis and the exceptions.

Question No. 34: May States use funds under § 104.772 to train and upgrade high school counselors to enable them to serve vocational education students better?

Answer: Yes. If the State chooses to use its funds for this purpose, it must incorporate this type of training in its approved five-year State plan and annual program plan for vocational eduaction. Sections 104.772 and 104.773 of the regulations address this point.

Question No. 35: May a State use its vocational education personnel training funds to train interpreter-tutors to work with deaf students of vocational education?

Answer: This use of the funds would be allowable if it is set forth in the approved five-year State plan and annual program plan for vocational education.

Question No. 36: May an LEA use funds under subpart 4, Part B of the Act, "Emergency Assistance for Remodeling and Renovation of Vocational Education Facilities" for new construction?

Answer: No. Section 191 of the Act is clear that this new program is for "modernization of facilities and equipment and the conversion of academic facilities necessary to assure that such facilities will be able to offer vocational education programs which give rea-

sonable promise of employment." The same section refers to "remodeling and renovation" of facilities. There is no authorization in subpart 4 for construction of new facilities. Use of funds for "construction of area vocational education facilities" is authorized in section 120(b)(1)(E).

Question No. 37: Are private, non-profit rehabilitation centers and workshops eligible for emergency remodeling funds under subpart 4?

Answer: No. Section 191 of the Act states, as eligible, only "local educational agencies in urban and rural areas."

Question No. 38: Are leased premises eligible for emergency assistance for remodeling under subpart 4?

Answer: Yes. The Act does not state whether leased premises are eligible for emergency remodeling assistance. Determinations will have to be made on a case-by-case basis. Facilities leased by an LEA under a 99-year lease should be treated as facilities owned by an LEA. Where facilities are leased on a short-term lease, the LEA might not score points under criterion 9 (§ 105.504(b)(9)), as use of funds to renovate premises on a short-term lease might not be economical.

COMMENTS AND RESPONSES

The following comments, suggestions, and criticisms were submitted in writing in response to the proposed rules. After the summary of each comment, a response is set forth stating the changes which have been made in the regulations or the reasons why no change is deemed necessary or appropriate. The comments are grouped based on the sections affected, arranged in sequence.

PART 104—STATE VOCATIONAL EDUCATION PROGRAMS

SUBPART 1—STATE ADMINISTRATION

§ 104.2 *Purpose:* Meaning of "where necessary maintain."

Comment. A commenter pointed out that one of the purposes of the new Act is to assist the States "in extending, improving, and, where necessary, maintaining existing programs of vocational education"; that the new Act specifically inserted "where necessary" in order to give the maintenance of existing programs a lesser priority than that given to expanding and improving programs; and that the proposed regulation fails to carry out that intention. Another commenter asked for a definition of "where necessary."

Response. In section 101 of the Act, Congress set forth the purposes of the new Vocational Education Act. The regulation, in § 104.2, repeats the language of section 101 exactly, leaving "extending" and "improving" programs of vocational education ahead of "maintaining" existing programs, and leaving in the phrase "where necessary" as modifying "maintaining existing programs." The Conference Report (Report No. 94-1701, p. 214) states: "The determination of necessity is to be made by appropriate State and local officials. The phrase is not intended to authorize the Commissioner of Education to apply a strict litmus test of absolute necessity before an on-going program can be funded. However, it is intended to encourage States to use their limited amount of Federal funds to invest in the often-expensive start-up costs of new programs." The maintaining of existing programs should be the subject of study in the preparation of the five-year State plan and the annual program plan and accountability report. Since the maintaining of existing programs is such a broad subject, no definition of "where necessary" has been attempted. No change is made in the regulation.

§ 104.2 *Purpose: "Youth with specific learning disabilities."*

Comment. A commenter recommended that § 104.2(a)(4) of the statement of "purpose" be amended to change the phrase "those with special educational handicaps" to "youth with specific learning disabilities."

Response. The "purpose" as set forth in § 104.2 is taken verbatim from section 101 of the Act. This statement of purpose was not changed by the Technical Amendments, Pub. L. 95-40. The Technical Amendments, however, include in the definition of handicapped, "persons with specific learning disabilities." A corresponding change is made in the definition of "handicapped" in the Appendix to Part 104 of the regulations.

STATE BOARD

§§ 104.31-104.33 *State board staff.*

Comment. A commenter recommended that the regulation include requirements for an adequate State board to carry out its responsibilities and functions, including a full-time director.

Response. The recommendation is accepted. A section (§ 104.34) is added to require the State board to provide for a State staff sufficiently qualified and in sufficient number to administer properly the State's program of vocational education. Through oversight this provision was omitted from the NPRM. Section 104(a) of the Act places great responsibility on the State Board for administration and leadership. The requirement for adequate staffing by the State board is entirely appropriate.

§ 104.32 *State board: Definition of the term "coordination."*

Comment. Several commenters suggested that the regulation be amended to define the term "cordination." These comments also inquired: (1) If the responsibilities of the State board for coordination of the development of policy and the development of the State plans were intended to limit the authority of the State board, and (2) if the State board is to limit its coordination activities to the groups identified in clauses (A) through (J) of section 107(a) of the Act.

Response. In requiring the State board to coordinate the development of policy and the development of the State plans with the agencies, councils, and individuals identified in section 107(a) of the Act, it was the intent of Congress to establish a mechanism to strengthen the planning function of the State board, rather than limit its authority. To carry out the mandate of section 104(a) of the Act, the State board convenes the planning group, established by section 107(a) of the Act, for at least three meetings during each fiscal year concerning the development of the annual program plan and accountability report and for at least four meetings concerning the development of the five-year State plan.

Although only representatives of the agencies, councils, and individuals identified in section 107(a) of the Act must participate in the decision-making activities of the planning group, the State board is responsible for coordinating the State plan with any group or individual having an interest in vocational education. Section 107 of the Act requires that the State board hold public hearings to provide every interested person or group the opportunity to participate in the development of the State plan. No change is made in the regulation.

§ 104.32 *Responsibilities of the State board.*

Comment. A commenter suggested that it may be misleading to list only the coordinative responsibilities of the State board in § 104.32 of the regulation. To correct this situation, it was suggested that the regulation be changed to read, "The State board's responsibilities shall include but not be limited to * * *."

Response. This recommendation is accepted. Section 104.32 of the regulation follows very closely the language of section 104(a) of the Act which sets forth the (non-delegable) responsibilities of the State board. In order to assure that the regulation provides a clear interpretation of the intent of the Act, the first sentence of § 104.32 of the regulation is amended to read, "The responsibilities of the State board include (but are not limited to):"

Comment. A commenter expressed the view that it was the intent of Congress to have the inspiration for the planning of the vocational education programs arise from the local educational level where the needs of the student are "best seen and cared for."

Response. Each local educational agency and postsecondary educational institution that participates in the vocational education program submits an application to the State board. The State plan is formed, in part, from the vocational education programs that are identified in the applications from local educational agencies and postsecondary institutions. Since the planning group is responsible for assuring that the State plan provides a comprehensive and coordinated vocational education program that is responsive to the total vocational education program needs of the State, no change is made in the regulation.

§ 104.32(d) *State board consultation with the State advisory council.*

Comment. In noting that the regulation specifies that members of the State board are responsible for consulting with the State advisory council, a commenter suggested that it is also appropriate for the staff of the State board and the staff of the council to consult frequently on matters of mutual concern.

Response. Section 104.32(d) of the regulation is consistent with section 104(a)(1) of the Act which requires that the State board consult with the State advisory council regarding the planning and reporting of the State's vocational education programs. The regulation reflects the intent of Congress, which was to establish a procedure to ensure the participation of the State advisory council in the development of the State plans and accountability reports. It is not the intent of the Act nor the regulation to preclude, discourage, or hamper in any way the exchange of formal or informal communications between the State board and the State advisory council, or between the staffs of the board and the council. Consultation between the two staffs need not be required in the regulations. No change is made in the regulation.

FULL-TIME PERSONNEL AND FUNCTIONS TO ELIMINATE SEX DISCRIMINATION AND SEX STEREOTYPING

§§ 104.71-76 *More specific guidance on full-time personnel.*

Comment. Many commenters requested more specific language in the regulations on the designation, support, and functions of the full-time personnel to eliminate sex bias. All felt that too many decisions were left up to the individual States and that the States need more guidance, particularly in this area.

Response. Although many decisions (such as placement of the personnel within the

State structure, the number of personnel necessary) will be left to the States to make, changes have been made in §§ 104.71–76 of the regulation in an attempt to strengthen and clarify the activities under these sections. These changes are spelled out in more detail in the following comments and responses.

§ 104.72 *"Employment/designation" of full-time personnel.*

Comment. A commenter felt that the words "designation" and "assign" in this section convey the impression that the State education agency must utilize personnel already employed by the agency to fill the positions under this section. Suggested instead was the use of the terms "employment/designation" and "employ/assign."

Response. The use of the terms "designation" and "assign" in § 104.72 is not intended to indicate that current State agency personnel must be used to fill the positions under this section. There is no indication in either the Act or legislative history that such an interpretation is valid. In addition, the joint terms suggested by the commenter ("employment/designation" and "employ/assign") are not seen as clarifying the meaning. However, in light of other comments received, further clarification appears necessary; therefore, the terms "designation" and "assign" have been changed to "selection" and "select."

§ 104.72 *Full-time personnel/personnel working full time.*

Comment. A number of commenters noted the difference between the language of the Act requiring "full-time personnel" and the language of the regulation requiring "personnel to work full time" on sex bias issues. Several of these commenters have requested that the language of the regulation be changed. Others, however, have opposed such a change on grounds that it might lead to hiring personnel to perform these functions on a less than full-time basis.

Response. The change of language in the regulation to "personnel to work full time" is intended to clarify the Act. It is apparent from the legislative history that Congress intended that the State have at least one professional working full time on the elimination of sex bias and sex stereotyping in vocational education rather than a person employed full time but working less than full time on the elimination of sex bias. Although personnel may be placed in any unit the State chooses, the professional personnel must work full time on elimination of sex bias and sex stereotyping in vocational education. Thus no change is made in the regulation.

§ 104.72 *Placement of full-time personnel.*

Comment. One commenter noted that neither the Act nor the regulation mandates the full-time personnel hired under this section to be employed by the State department of education, vocational education division. Therefore, this commenter interpreted this to mean that it is not necessary for personnel filling these positions to be employees of the State vocational division.

Response. The commenter is correct in this interpretation. It appears from the legislative history that Congressional intent was not to limit the State in placing this personnel within the State structure. Page 215 of the Conference Report (No. 94–1701) states that there is no intention "that the State must assign such personnel to the State board." Each State may decide where the personnel will function best. The personnel may operate within the vocational division or may work from another area. However, the personnel must work full time on elimination of sex bias and sex stereotyping in vocational education. No change is made in the regulation.

§ 104.72 *Criteria for selection of full-time personnel.*

Comment. Many commenters expressed the concern that, unless criteria for the selection of the full-time personnel were set forth by the regulation, the positions might be filled with persons who are not qualified or who might compound the bias problems. The criterion most often suggested was that the persons chosen for these positions have demonstrated a commitment to the elimination of sex bias in educational programs. Other qualifications suggested include knowledge of sex bias problems and issues, leadership capability, vocational education background, creativity, patience, and determination. Several commenters felt that the States should be required to advertise the position widely and to assure that it be open to all applicants. One commenter proposed that there be a selection committee to be made up of individuals with knowledge of sex bias issues.

Response. The recommendation is accepted in part. The regulation will not prescribe specific criteria for the States to use in selecting the full-time personnel. As in selection of other State personnel, the criteria will vary from State to State; however, a paragraph has been added requiring that the States match the qualifications of the applicants with the responsibilities of the job.

§ 104.73(a) *Definition of sex bias.*

Comment. Several commenters expressed concern over the proposed definition of "sex bias." The difficulty stems from the statement that "as used in the Act and the regulations, sex bias * * * includes sex discrimination." One commenter remarked that bias and discrimination are not the same. Others were concerned that "sex stereotyping" had been left out. These commenters suggested that "sex stereotyping" be added wherever "sex bias" is used in the regulations or that "sex stereotyping" be added to the final sentence in the definition on the use of "sex bias" in the Act and regulations. Still others favored discarding the proposed definition for a new one.

Response. The recommendation that the definition of sex bias be modified is accepted. The final sentence of § 104.73(a) is deleted since it is confusing rather than clarifying. In addition, the use of the terms "sex bias," "sex discrimination," and "sex stereotyping" are clarified throughout the regulations.

§ 104.74 *$50,000 Minimum.*

Comment. Several persons commented on the $50,000 set by the regulation as a minimum for support of the full-time personnel. The comments were evenly divided regarding the words "at least $50,000." Some commenters felt it important to stress that this is a minimum, while others felt that the $50,000 is a specific amount set by the law to be no more and no less.

Response. There is nothing in the Act to prevent a State from spending more than $50,000 to support the full-time personnel, but a State may not spend less than that amount. To emphasize this point, the language of the regulation has been amended to read "not less than" $50,000.

Comment. A few commenters felt that the salary items (§ 104.74(b)(1) and (2) should be combined to read "salaries for full-time staff," without making a distinction between professional and support staff.

Response. Section 104(b)(1) of the Act is interpreted to mean that the professional staff, but not necessarily the support staff, must work full time on the functions set forth in § 104.75. The regulation does not mandate that clerical and other support staff work full time in this area. Thus, the question whether support staff must work full time is left to the discretion of the State. No change is made in the regulation.

§ 104.74(b) *Allowable activities.*

Comment. Many commenters were concerned that § 104.74(b) was too restrictive regarding use of the $50,000. These commenters requested that items be added to the list of allowable expenditures, such as publications, workshops, and dissemination of information.

Response. The proposed language in § 104.74(b) is reasonable in that it provides sufficient guidance to the States on the use of funds while being broad enough to include the additional list of activities suggested. The measure of a legitimate expense under this section is the degree to which it relates to the support of the personnel in carrying out the functions set forth in § 104.75. No change is made in the regulation.

§ 104.75 *Minimum requirements for accomplishing "sex bias" functions.*

Comment. A number of commenters felt that the regulation should spell out the minimum requirements to accomplish the functions listed in § 104.75. They felt that the full-time personnel needed specific guidance in fulfilling their responsibilities. Specific suggestions include development of a complaint process, a strengthened public information component, an annual report on the status of women in vocational education programs, and the use of the Title IX self-evaluation.

Response. Although the functions listed in § 104.75 provide a framework within which the full-time personnel will work, some of the above suggestions offer more guidance and have been included. Requirements have been added to emphasize the public information function of the personnel, especially in assisting the State board in publicizing the State plan hearings. Also included are references to the Title IX complaint process and self-evaluation. Other more specific suggestions were not included, since the full-time personnel will develop a plan to implement the functions which will address the needs of the particular State, and further guidance was felt unnecessary.

§ 104.75(a) *Reduce sex bias and sex stereotyping.*

Comment. One commenter suggested that "sex bias" be added to the language in subsection (a) of § 104.75 in addition to sex stereotyping.

Response. The recommendation is accepted. To clarify the regulation, "sex bias" has been added.

§ 104.75(d) *Review of distribution of grants and contracts.*

Comment. A number of commenters felt that review of the distribution of contracts as well as grants should be included in this function.

Response. The recommendation is accepted. Since the State's research, exemplary, and curriculum development programs will be conducted through contracts and since these areas also emphasize elimination of sex bias and sex stereotyping, it appears that review of contracts as well as grants would comply with Congressional intent.

§ 104.75(h) *Availability of information.*

Comment. Several commenters recommended that the language of this subsection be changed to require the full-time personnel to make information developed pursuant to the statutory functions available to the groups listed in § 104.75(h) through the State board rather than supplying the information to the board as well as to the other groups.

Response. The regulation is consistent with the Act which states that the information will be made available to the State board, the National and State Advisory Councils on Vocational Education, the State Commission on the Status of Women, the Commissioner, and the general public. In addition, making information available to the general public through the State board would be difficult. Therefore, no change is made in the regulation.

STATE ADVISORY COUNCIL

§ 104.91 *State advisory council establishment.*

Comment. Commenters pointed out that the regulation does not conform to the Act regarding the appointment of the State advisory council in the case of States in which the members of the State board are elected. The regulation refers only to the "State board" while section 105(a) of the Act uses the term "State board of education."

Response. While this appears to be an inconsistency, the legislative history supports the reference to the State board designated or created by State law as the sole State agency responsible for the administration of vocational education or for supervision of the administration of vocational education in the State. In a great majority of the States, the State board of education serves also as the State board for vocational education. There appears to be no reason for denying to an elected State board for vocational education the authority to make the appointments to the State advisory council. Therefore, the broader term "State board" is not changed in the regulation.

§ 104.92(a) *State advisory council membership.*

Comment. Several commenters suggested that additional groups should be represented on the State advisory council. The additional group representatives suggested were: State planning agencies, adult education, homemaking, college career planning and placement services, State's agency on aging, and the planning and coordinating agency for postsecondary education.

Response. Since categories mandated by section 105 of the Act number twenty, many of which imply multiple representation, it appears unwise to require additional appointments, thereby making the councils too large, unwieldy, and costly to operate under existing budget limitations. Councils are urged to obtain input from interested groups, not directly represented by membership, through their evaluation and public hearing process. No change is made in the regulation.

§ 104.92(a) *Women on State advisory councils.*

Comment. Many commenters suggested that § 104.92(a)(17) include language to the effect that at least two women be required to fulfill the requirement. While the wording of the regulation is taken directly from the Act, it was clear that the Congress intended more than one woman to fill this category. Unless the regulation is so stated, there is danger of misinterpretation at the State level.

A commenter also recommended that the phrase "one or more persons" used in the sentence having reference to minority groups be changed to "women," which is the statutory language.

Response. The recommendation relating to the change in wording of § 104.92(a)(17) from "one or more persons" is accepted.

Although a number of categories listed in this regulation use plural words, the determination of the actual number necessary for each category should be left to the appointing authority rather than have the regulations specify an exact number. Specifically, in the case of category (17), whether one or two women are appointed may depend on the number of women already appointed to other categories. The Commissioner, however, encourages the States to appoint at least two women to fulfill the requirement in category (17). No further change is made in the regulation.

§ 104.92(b)(3) *Appropriate representation.*

Comment. A great many commenters pointed out the need to define "appropriate representation," especially as it relates to the representation of women on the council. It was recommended that "appropriateness" be based on such criteria as the proportion of women and minorities in the State's general population, the State's work force, their representation in vocational education programs, or a combination of such factors. Further, it was suggested that the membership must include persons with an understanding about and commitment to remedy the consequences of sex and minority discrimination.

Response. The recommendation is accepted. While specific quotas are not prescribed, the final regulation includes a statement intended to implement § 104.92(b)(3). In order to reflect effectively the diverse interests and needs of the general public served by the Act, the statement makes clear that the appointing authority shall appoint to the council a significant proportion of women, racial and ethnic minorities, and representatives of geographic regions in the State. The Commissioner considers the term "appropriate representation" to be representation which generally reflects the percentage of women or minorities in the population of the State or the percentage of women or minorities in the work force of the State.

§ 104.93 *Liaison with State Advisory Panel for Handicapped.*

Comment. Two commenters suggested a function of the State advisory council on vocational education be added requiring "appropriate liaison and coordination activities with the State Advisory Panel for the Handicapped."

Response. It is agreed that to insure consistency in planning and program implementation, liaison and coordination between the two agencies are essential. However, as a result of the Technical Amendments, § 104.93(f) has been amended to include "special education" as one of the programs to be assessed for its part in the consistent, integrated, and coordinated approach to meeting the employment and training needs of the State. This provision, along with the required representative of the handicapped on the State advisory council, is intended to assure the necessary coordination. No change is made in the regulation.

§ 104.93(a) *Council certification.*

Comment. A commenter requested the deletion of the last sentence of § 104.93(a) since this appeared to be a duplication of the certification required by the council representative in § 104.171(b)(2).

Response. In addition to the certification by the council representative relating to the opportunity to participate in the planning process, the council itself must be consulted in the plan development process. Thus, the council has two avenues for involvement in the planning, with the latter being a greater commitment than that afforded other agencies. Since this procedure is statutorily mandated, no change is made in the regulation.

§ 104.93(d) *State board evaluation.*

Comment. A commenter objected to the word "assist" and stated that the law used the word "consult."

Response. Section 112(b) of the Act says that the State shall "consult" with the council and that the council shall "assist" the State in developing the plans. Since the regulation (§ 104.93(d)) uses the word "assist" in relation to assisting the State board, no change is made in the regulation.

§ 104.93 *SACVE function—Evaluation.*

Comment. Commenters suggested that the regulation provide additional direction with regard to certain of the council functions including the following: freedom to conduct whatever independent evaluation it chooses, requirement that data requested from the State board not be denied, evaluation by the council be of State board programs and not LEA programs, the time, frequency and use to be made of the "employment needs" assessment, compatibility of council findings with State-wide goals of State board, relationship of councils to State Occupational Information Coordinating Committee and the State Manpower Services Council, kinds of technical assistance to be given local advisory councils and input into the evaluation process by the local councils.

Response. While the comments have merit, the regulation intentionally provides considerable flexibility to councils in dealing with the newly assigned functions and responsibilities. If problems persist, additional technical assistance may be provided by the staff of the National Advisory Council on Vocational Education or the Office of Education. No change is made in the regulation.

§ 104.94 *Public meetings.*

Comment. A commenter suggested that guidelines be provided for public meetings and that these meetings be held separately from hearings on State plans.

Response. The requirement for public meetings is well established since this procedure was initiated through the Vocational Education Amendments of 1968. Since the council's public meeting is for a different purpose than the public hearings on the State plans, there is no justification for combining meetings. No change is made in the regulation.

§ 104.95(a) *Staff.*

Comment. A commenter suggested that professional and technical personnel be required to demonstrate a commitment to equal rights and sensitivity to the needs of populations being served. Another commenter requested deletion of the provision that the personnel not include members of the State board staff.

Response. Even though the qualifications for personnel suggested are desirable, the matter of personnel selection and the qualifications desired is a responsibility of the council. The exclusion of State board staff from serving as council staff is consistent with the Congressional intent of maintaining council independence from the administering agency. No change is made in the regulation.

§ 104.95(b) *Compatibility with State policies.*

Comment. Two commenters suggested that paragraph 104.95(b) be deleted since it is an infringement on the fiscal independence of the council.

Response. While it is agreed that the council should have independence from the program administrative agency, it was not intended that councils act outside the existing framework of State law and regulations on fiscal matters. Accordingly, the regulation is necessary to establish a degree of responsibility in fiscal matters and compatibility with other State agencies. This is intended to fore-

stall excesses which could bring criticism of the council. No change is made in the regulation.

§ 104.96 *Fiscal independence.*

Comment. Commenters suggested that the regulation make clear that councils are to be solely responsible for the expenditure and use of their funds. Regulations should provide that if the State board is the fiscal agent, the council must certify that its selection was of its own initiative and not subject to influence by the State board. It was also suggested that the phrase "except as provided in § 104.95(b)" be deleted.

Response. Section 105(f)(2) of the Act provides that the expenditure of council funds is to be determined soley by the council for carrying out its functions. However, as noted in the response under § 104.95(b) above, the councils cannot act outside the existing framework of State law and regulations on fiscal matters. The regulation makes it clear though that the responsibility for designating a fiscal agent is assigned directly to the council. No change is made in the regulation.

§ 104.97 *Evaluation report.*

Comment. Commenters suggested that the regulation require additional procedures related to the council evaluations, including public comment on the council's evaluation report, review of the content, techniques, and validity of the vocational education data system and assessment of the impact of vocational education programs on women and minorities.

Response. While all the suggestions are worthy of consideration by councils in performing their functions, the Congressional intent, as evidence by the Act and legislative history, was to allow flexibility in the procedures used by councils. Since the Act requires at least one public meeting, a vocational education data system, and no discrimination on the basis of sex or minority groups, it is reasonable to expect that the council's evaluation will give consideration to these items. No change is made in the regulation.

§ 104.97 *Evaluation by State advisory council*

Comment. A commenter recommended that the regulation require a written agreement between the State board and the State advisory council as to the role of each in evaluating programs.

Response. The State board and the State advisory council may wish to reduce their working agreement to writing. However, in the interest of keeping regulatory requirements to the minimum, the Commissioner has decided not to require a written agreement between the State board and the State advisory council. No change is made in the regulation.

§ 104.97 *State board comment.*

Comment. A commenter suggested that the council's evaluation report be accompanied by comments of the State board and that the response in writing to each recommendation accompany the State plan.

Response. The annual evaluation report is required to be submitted through the State board, at which time the board may attach comments if it desires. However, § 104.241 (b)(2) requires that the accountability report, which must be submitted by the State board, include the board's consideration of each recommendation in the council evaluation report. Therefore, no change is made in the regulation.

LOCAL ADVISORY COUNCILS

§ 104.111 *Local advisory councils—representatives of additional groups.*

Comment. Many commenters suggested broadening the categories of membership required on the local advisory council so that the categories would be similar to the categories required of membership on the State advisory councils. Others recommended the addition of representatives of specific categories. Specific categories mentioned were: categories (17), (18), (19), and (20) described in §104.92(a) in relation to the State advisory council; women; racial, ethnic, or major language minorities; private schools; persons knowledgeable in vocational education (but not administration); manpower services; local prime sponsor councils under the authority of CETA; the State agency responsible for data collection; and community based organization. Commenters particularly recommended that the phrase "shall be composed of members of the general public" be interpreted to include appropriate representation of women and minorities.

Response. The recommendations have been accepted in part. Since one of the main purposes of the Act is "to overcome sex discrimination and sex stereotyping in vocational education" and to "furnish equal educational opportunity" (sec. 101(3)) the Commissioner will require that an appropriate representation of women and minorities be represented on the local advisory council. Therefore, a new paragraph has been added to § 104.111 to read as follows:

(d) Each eligible recipient shall establish a local advisory council which has an appropriate representation of both sexes and an appropriate representation of the racial and ethnic minorities found in the program areas, schools, community, or region which the local advisory council serves.

§ 104.111(b) *Local advisory council establishment.*

Comment. A few commenters asked whether the regulation governing the establishment of local councils precludes the possibility of LEAs establishing local advisory councils on a regional basis with other LEAs. In the same connection, some commenters asked whether one council may serve more than one eligible recipient.

Response. Section 104.111(b) of the regulations is based on section 105(g)(1) of the Act which provides in part that "local advisory councils may be established for program areas, schools, communities, or regions, whichever the recipient determines best to meet the needs of that recipient." The eligible recipient, therefore, has the option to establish a local council which also serves another eligible recipient in the same geographical region of the State. For example, an LEA and a community college in the same region may decide to establish one local council to advise both recipients. This arrangement may be highly desirable for both recipients in the event they are striving for greater articulation between secondary and postsecondary interests. Accordingly, no change is made in the regulation.

§ 104.111(d) *Craft committees.*

Comment. A commenter pointed out that the regulation implies that only advisory councils would be required at the local educational agency or postsecondary level, despite the fact that advisory assistance through craft committees to each vocationally-funded teacher is considered essential to insure an effective instructional program.

Response. There is no intent to diminish the importance of craft committees. In fact, by making reference in the regulation to "representatives from several craft committees, * * *" the regulation assumes that craft committees are in existence and will be continued. No change is made in the regulation.

§ 104.111(d) *General local advisory council.*

Comment. A commenter suggested that paragraph (d) of § 104.111 be eliminated since it appears to be in conflict with paragraph (a) wherein eligible recipients are required to establish local advisory councils. It is contended that this paragraph, by suggesting that existing craft committees "may join together" to form an advisory council, takes away from the eligible recipient the responsibility for determining the make-up and method of establishing its council.

Response. The regulation is considered to be merely suggestive of a method of establishing the mandated local advisory council where craft committees or school councils already exist. It is intended to be supplementary to paragraph (a) rather than in conflict with it. No change is made in the regulation.

§ 104.112 *Public meeting.*

Comment. A commenter suggested the addition of a requirement for the local advisory council to hold not less than one public meeting each year at which time the public is given an opportunity to express views concerning the programs being offered by the local educational agency and the postsecondary educational agency.

Response. While the recommendation has merit, it is not appropriate to assign additional duties to the local advisory council when there is no authority for funding. No change is made in the regulation.

§ 104.112(b) *Local advisory council duties.*

Comment. Commenters suggested that mandating local advisory councils to "assist" the eligible recipient in developing its application goes beyond Congressional intent and would exert an undue hardship on local educational agencies. Commenters also suggested that local advisory councils be required to take an active role in the evaluation of local programs.

Response. The first recommendation is accepted. Since the Act in section 108(a)(4)(A) uses the word "consultation," the regulation is rewritten to state "consult with" in place of "assist".

With respect to the issue of whether local councils are to conduct evaluations, section 105(g)(1) provides that the local council advise the eligible recipient on the degree to which the courses being offered by the eligible recipient meet current job needs in the area. Although this activity may be viewed as a minor component of program evaluation, it should not be considered the equivalent of evaluation. Furthermore, since the Act does not provide any funding for the local councils, assigning the costly function of evaluation to the local council does not seem appropriate. However, it is expected that local councils will make extensive use of secondary data sources and any relevant evaluations that are made by other agencies. No change is made in the regulation.

NATIONAL OCCUPATIONAL INFORMATION COORDINATING COMMITTEE

§ 104.121 *Establishment of the National Occupational Information Coordinating Committee (NOICC).*

Comment. A commenter recommended that a section be added, prior to the state-

ment on the State Occupational Information Committee (SOICC), on the establishment of NOICC.

Response. The recommendation is accepted. Although the regulation does not include rules governing NOICC and SOICC, or other rules governing internal Federal organization, SOICC is described, and for consistency, NOICC is also described. A new § 104.121 on NOICC has been added.

STATE OCCUPATIONAL INFORMATION COORDINATING COMMITTEE

§ 104.121 *Fiscal agent for State Occupational Information Coordinating Committee.*

Comment. Several commenters recommended that the regulation identify the fiscal agent for the State Occupational Information Coordinating Committee (SOICC). Some of the commenters suggested that the State board for vocational education should be the fiscal agent. One commenter suggested that the Governor should appoint the agent.

Response. The regulation, as written, does not state who the fiscal agent shall be. NOICC, when making funds available to SOICCs, may require the establishment or naming of a fiscal agent. No change is made in the regulation.

§ 104.121 *State Advisory Council involvement with State Occupational Information Coordinating Committee.*

Comment. A commenter, noting that a representative of the SACVE is not named in section 161(b)(2) of the Act as a member of the SOICC, recommended that the regulation encourage SACVE involvement in the development of the State's occupational information data system which SOICC will develop and SACVE will use.

Response. The Act (section 161(b)(2)) and the regulation (§ 104.121(b)) set forth the required membership of SOICC. SOICC officially will be made up of representatives of only the four agencies named. Additional involvement with individuals and agencies may take place. No change is made in the regulation.

§ 104.121(c) *Representatives on State Occupational Information Coordinating Committee.*

Comment. A commenter suggested that the Governor, rather than the respective agency, should appoint the agency's representatives on SOICC. Another commenter suggested that staff represent the State Manpower Services Council rather than a member of the Council. Another recommended that the chief executive officer be the representative. Others suggested that the Governor should appoint additional members such as representatives of the CETA prime sponsor, guidance and counseling personnel, and career education personnel.

Response. Section 161(b)(2) of the Act states that SOICC shall be composed of a representative of each of four designated State agencies; § 104.121(b) carefully follows the Act. In paragraph (c) it is stated that the "representatives shall be selected by the respective State board, agency, or council." The Commissioner believes this is the proper interpretation of the word "representative," i.e., a person chosen by the group he or she represents. The Commissioner also believes that the representatives of the four designated groups should make up the entire voting membership of SOICC. The State might, however, appoint other observers or non-voting members. Therefore, no change is made in the regulation.

GENERAL APPLICATION

§ 104.141(c) *General application amendment.*

Comment. A commenter questioned the provision of § 104.141(c) that amendments to the general application be made only if and when "provisions of section 106 of the Act are changed or expire." For example, it was suggested that if a State changes its fiscal control and accounting procedures under assurance (7), this should be reflected by amending the general application.

Response. The assurances are comprehensive in coverage and obligate the State to adhere to the provisions of the general application in the future. Hence any change in procedures by a State would also be subject to compliance with the assurance on file, and no amendment to the general application is necessary. At such time, however, that a change in procedures violates the assurances of the general application, the State should notify the Commissioner accordingly. No change is made in the regulation.

§ 104.141(e) *Procedures to carry out assurances.*

Comment. A commenter stated that the procedures to be included in the five-year State plan for assurances 4, 5, 9, and 10 are not mandated in the Act, and that the requirement is inconsistent and arbitrary since procedures are not required for other assurances. The commenter suggested that the requirement be deleted.

Response. Section 109 requires determination by the Commissioner that adequate procedures exist "to insure that the assurances of the general application" will be carried out. Accordingly, it was determined that assurances 4, 5, 9 and 10 require a description of procedures in order for the Commissioner to approve a plan as being in compliance with the law. No change is made in the regulation.

§ 104.141(f)(4)(A) *Consultation with Prime Sponsor.*

Comment. A commenter recommended revision of § 104.141(f)(4)(A) to include a representative of prime sponsors in those areas where there is a prime sponsor.

Response. Section 104.141(f)(4)(A) provides that the annual application be developed in consultation "with representatives of the educational and training resources available in the area." While prime sponsors are not specifically named, they are certainly recognized as a training resource and should be consulted. No change is made in the regulation.

§ 104.141(f)(5) *Consistency with the Handicapped Act.*

Comment. A commenter suggested the addition of "(C) have the State vocational education plan be fully consistent with the State plan under the Education for All Handicapped Children Act of 1975 and the Federal regulations under that Act."

Response. Section 104.141(f)(10) restates the Act and requires that funds used for programs for the handicapped be consistent with the State plan under the Education of the Handicapped Act, which includes the Education for All Handicapped Children Act and the regulations under that Act. Therefore, the suggested phrase is a duplication. Also, a new regulation, § 104.5 has been added which cross-references the requirements in Part B of the Education of the Handicapped Act. Each State education agency should read the relevant regulatory provisions in 45 CFR Part 121a since those regulations provide the specific rules which govern the expenditure of Federal vocational education funds for handicapped children within the State.

§ 104.141(g) (Renumbered § 104.141(f)(11)) *Assurance of cooperation with NCES.*

Comment. Several commenters suggested that the assurance in § 104.141(g) be deleted since there is an inconsistency with the assurance in § 104.141(f)(3) which requires supplying information to the Commissioner. It was contended that the Administrator of the National Center for Education Statistics (NCES) should get any information needed from the Commissioner. One commenter indicated that this assurance is a duplication and, in fact, may cause great confusion in terms of the report that is collected. Two of the commenters suggested the regulation was more stringent than the Act in using "shall assure" rather than the Act language "shall cooperate."

Response. Section 161(a) places responsibility for operating the national vocational education data reporting and accounting system with the Administrator of NCES, after jointly developing with the Commissioner the information elements and uniform definitions. Accordingly, the Commissioner believes it is essential to require an assurance that the State will cooperate with NCES in supplying the data jointly agreed to be collected under the system. No change is made in the regulation.

§ 104.141(h) (Renumbered § 104.141(f)(12), *Indian participation.*

Comment. Several commenters questioned the inclusion of the assurance in § 104.141(h) since this is not contained in the law and suggested it be deleted. Other commenters proposed revised language for clarification that the State board does not allocate funds directly to Indian tribal organizations.

Response. Because of the potential for excluding Indians from the regular vocational programs, the recommendation for revision is accepted and the assurance in § 104.141(f)(12) will now read:

"The State board shall also assure that students served by Indian tribal organizations applying for or receiving funds under the Commissioner's discretionary programs, under the authority of section 103(a)(1)(B) of the Act, shall be afforded the opportunity to participate in vocational education programs administered by the State.

DEVELOPMENT OF FIVE-YEAR STATE PLAN

§ 104.161 *Development of five-year State plan.*

Comment. A commenter recommended that consideration be given to more appropriate planning and management procedures. The opinion was expressed that the planning process suggested is completely outdated, and that learner-oriented goals for vocational education should be used instead of goals based on employment needs. Further, if the legislation stressed what outcomes are desirable, States could use their own discretion as to how to achieve these outcomes.

The same commenter recommended that every effort be made to secure additional funding for planning and evaluation purposes and also make provision to compensate the representatives involved in the planning group.

Response. The language of the regulation concerning the planning process follows closely the Act. The State may, of course, employ planning procedures beyond those specified so long as the State plan requirements are met. The matter of changing the planning procedures and obtaining additional funding must be resolved through the legislative process. No change is made in the regulation.

§ 104.161 *Time for development of a model plan.*

Comment. Several commenters indicated that the period of time for development of plans is too short. One commenter suggested that the five-year State plan be revised by July 1, 1978, on a one time basis, since lack of experience and the short deadline for the initial plan will make it difficult for States to prepare a model plan by July 1, 1977.

Response. The Commissioner has no authority to waive the requirement of a complete five-year State plan by July 1, 1977. While States may not be able to develop an exemplary plan initially, the minimum requirement must be met. It is anticipated that States may wish to make amendments to improve the plan during the first year. In addition, the updating procedures in the annual program plan provide a mechanism for change and improvement of the five-year State plan. No change is made in the regulation.

§ 104.162 *Local Educational Agency (LEA) input to State plan.*

Comment. A commenter suggested that, while use of a representative group for planning is a good procedure, input and data from local educational agencies should be used as one of the key bases for formulating the State plan.

Response. While not specifically so outlined, Sections 107 and 108 of the Act rely heavily on input and data from eligible recipients in formulating both the five-year State plan and the annual program plan. The plans in fact constitute an aggregation of the State's total effort in vocational education, and the State must reply on the eligible recipients for this date. No change is made in the regulation.

§ 104.162 *Appointing authority for selecting representatives.*

Comment. Commenters objected to the requirement that the appointing authority under State law designate the representatives for § 104.162(e), a local school board; § 104.162(f), vocational education teachers; and § 104.162(g), local school administrators. These objections were based on the commenters' interpretation that these appointments might be political appointments by the Governor. These commenters expressed a preference for a requirement that each of the agencies appoint its own representative.

Response. The language of the Act reads: "as determined by State law." This language was subject to interpretation and was construed to mean the appropriate appointing authority in the State. Accordingly, the language "as designated by the appropriate appointing authority" was added to § 104.162 (e) through (g) to assign the responsibility for appointing these three representatives to the individual or State agency (i.e., the Governor or the State board) having authority to make appointments under State law. No change is made in the regulation.

§ 104.162 *Representation on planning group.*

Comment. A number of commenters suggested additional representatives and rationale for their inclusion in the development of the five-year State plan. The list included: Four-year institutions of higher education, State educational agency responsible for education programs for the handicapped, State agency on aging, State agency administering the vocational rehabilitation program, and State Commission on the Status of Women.

Response. The Act is specific relative to membership on the planning group. It is inappropriate for the regulation to require additional representation on the planning group beyond the representatives of the ten groups specified in Section 107(a)(1) of the Act. States may involve the above groups and other groups it wishes to include in the planning process; however, only those ten groups designated by the Act constitute the decision-making group. Other groups are encouraged to provide input either directly to the planning group or through the public hearing process. No change is made in the regulation.

§ 104.162 *Number of representatives on the planning group.*

Comment. Two commenters raised the question of whether it would be appropriate for a State to have participants other than the ten representatives specified in section 107(a)(1) of the Act involved in the decision-making process regarding provisions of the State plan.

Response. While representatives of other groups may participate in the planning process, only one designated representative from each of the ten groups specified in section 107(a)(1) of the Act must be involved in the approval of the provisions of the five-year State plan or the annual plan. No change is made in the regulation.

Comment. A commenter asked if it is possible for the State board to design the membership of the planning group in such a way that the State educational agency's personnel constitute a majority of the voting membership. This commenter also wanted to know whether the State board may appoint several persons for each category or if it is limited to only one representative for each.

Response. Although there is no requirement that each representative to the planning group have a vote, the responsibility for decisionmaking regarding approval of the provisions of the State plans is limited to one designated representative for each of the ten categories set forth in section 107(a)(1) of the Act. One person may represent more than one of the ten categories if the agency he or she represents has responsibility in more than one of the designated areas. No change is made in the regulation.

§ 104.162(f) *Representatives of vocational teachers.*

Comment. A commenter recommended that "including guidance specialist" be added after "vocational education teacher" in § 104.162(f). Another commenter recommended that the regulation preclude supportive staff being included in the vocational teacher category.

Response. While certain guidance personnel may be considered vocational education teachers, the regulation does not go beyond the Act in requiring the inclusion of such personnel. The Commissioner believes the State law will determine which supportive staff, if any, are eligible. No change is made in the regulation.

§ 104.164(b) *State plan content relative to rejected recommendations.*

Comment. Concerning the inclusion of rejected recommendations in the State plan, a commenter suggested that the regulation should require only a summary of the recommendations rejected and the reasons for rejection rather than the original correspondence and any primary data.

Response. Section 104.164(b) requires only a listing of the rejected recommendations, the individual, agency, or council making the recommendation and the reason for rejection. These items in fact constitute a summary and should not result in a voluminous data requirement. No change is made in the regulation.

§ 104.164(b)(1) *State board adoption of State plan.*

Comment. One commenter recommended that the language in this paragraph be changed to read, "Any recommendation which is rejected by the State board indicating its source," rather than "and its source."

Response. The recommendation is accepted. This change in language will clarify the requirement that the State board specify the particular agency making the recommendation.

§ 104.165 *Public hearings.*

Comment. Several commenters objected to the phrase "Prior to adoption" in § 104.165(a)(1) because it seems to compromise significantly the entire purpose of public hearings on the plan. In their view, the regulation permits a State to conceive, develop, and draft the plan without any significant input from the public. Their further contention is that the plan, once drafted, would not likely be changed. It is suggested that the phrase be changed to read: "Before the plan is written."

Response. The recommendation is accepted in part. The opportune time to hold public hearing is during the period of the plan's development. Accordingly, the regulation is changed to require the hearings "during the development, prior to adoption." If public hearings were held prior to the preparation of an initial draft, it would be difficult for the public to provide any meaningful direction since there would be no framework to initiate public discussion and reaction. Public input can be most important after there is a draft of the plan; however, the State may hold public hearings before there is a first draft or at any stage during the development of the plan when input may be useful.

§ 104.165(a)(3) *Public hearings by region.*

Comment. Commenters requested a definition of "all regions of the State." A few commenters suggested that several definitions be developed so that the State may choose from among them. Definitions suggested include (1) commonly recognized geographic divisions, (2) quadrants, and (3) areas feeding vocational-technical schools.

Response. Since most States have recognized regional divisions, it would be preferable to leave to the State how to define its regions and how best to serve the populace in the respective regions with regard to holding public hearings. No change is made in the regulations.

§ 104.165(c) *Public views included in State plan.*

Comment. A commenter suggested that, because of the volume of paperwork involved in including all views expressed at the public hearings in the State plan, only a summary of those views be included along with an explanation of how the State board plans to consider those views.

Response. Provisions of §§ 104.165(c) and 104.171(d) are intended to require inclusion of a summary of the views expressed at the public hearing and written comments submitted rather than letters, statements, and other primary data. Also to be included are the plans to implement those views accepted and the reasons for rejecting those views not included as part of the plan. No change is made in the regulations.

§ 104.165(c)(3) *Public hearings.*

Comment. A commenter recommended that the phrase "accepted for inclusion" be substituted for the term "included" in line 2 of § 104.165(c)(3).

Response. The recommendation is accepted. The revision will provide greater clarity to the State board's responsibility of setting forth the reason for rejecting any view submitted. The regulation is changed to read: "The reasons for rejecting any view which is not accepted for inclusion in the five-year State plan."

§ 104.171 *Certification of plans.*

Comment. A commenter recommended that this regulation include a paragraph which states: "The approval of an application under this part does not relieve an applicant agency of the responsibility to carry out its project or projects in accordance with the general application,, the statute, and applicable regulations." The commenter felt this paragraph was necessary because the State board might consider compliance with certification requirements tantamount to approval by the Commissioner and write its plans accordingly.

Response. Section 104.171 requires a number of certifications regarding the State plan but does not serve as a guide for preparing the plan. Specific requirements for the content of the five-year State plan are set forth in §§ 104.181 through 188, and these detailed requirements must be adequately described before the Commissioner will approve a plan. No change is made in the regulation.

§ 104.171 *Number of certifications required.*

Comment. A few commenters suggested that many more certifications are required by the regulation than are mandated by the Act. A further comment was that the signature of each representative on the planning group required in § 104.171(b)(2) goes beyond the law and could be embarrassing to some of the signers.

Response. The inclusion of additional certifications in § 104.171 is intended to clarify statutory requirements necessary for compliance. By signing the certification required in § 104.171(b)(2), each representative on the planning group merely certifies that he or she had the opportunity to take an active part in formulating the plan. No change is made in the regulation.

§ 104.181 *Guidelines.*

Comment. Several commenters requested that the Office of Education reconsider the issue of promulgating separate guidelines for State plans. The view was expressed that, in fact, the proposed regulations are not precise, particularly with regard to State plans and State administration. They fear that plans will be weak and will not comply with the law. Concern related especially to the need to have State plan sections dealing with elimination of sex bias and sex stereotyping evaluated by persons with special knowledge of those issues.

Response. Public response to the Notice of Intent was divided on the issue of the need for additional guidelines. The Commissioner concluded that it was preferable not to issue separate guidelines, but rather to issue regulations which specify precisely what is required by the Act. With respect to the statutory requirements, the States will have considerable flexibility in determining how to meet the requirements of the Act and the regulations in the development of the State plan. Regarding the review of the plan, particularly in the area of sex bias and sex stereotyping, that review is one of the functions of the full-time personnel to eliminate sex bias listed under § 104.75, and § 104.171 (g) requires that this personnel certify that they have had an opportunity to review the plan. No change is made in the regulation.

§ 104.182 *Procedures to assure compliance.*

Comment. A commenter felt that the regulations have an inordinate number of very specific requirements which would, in effect, reduce the State's options. As an example, the commenter cited § 104.182 and suggested that this regulation be deleted.

Response. The language of the regulations follows closely the language of the Act. The procedures to assure compliance contained in § 104.182 are deemed necessary by the Commissioner as a minimum to comply with section 109(a)(1) of the Act. No change is made in the regulations.

§ 104.182 *Additional procedures.*

Comment. A commenter suggested that the State Commission on the Status of Women in each State be designated as the agency to review the compliance procedures and to make a public statement as to the degree of progress relative to the elimination of sex role stereotyping.

Response. Although the State Commission on the Status of Women is encouraged to study the progress being made within a State to eliminate sex bias, there is no legal basis for requiring that Commission to monitor compliance procedures in the State. The personnel working to eliminate sex bias, under § 104.72, must review State plans and State programs, particularly for elimination of sex bias and sex stereotyping. The Commission may work with this personnel in accomplishing the functions under § 104.75. Also, the Commission may provide input annually to the State board through the public hearing process. No change is made in the regulation.

§ 104.182(f) *Consistency with Handicapped Act*

Comment. Two commenters recommended that the reference in this section to "child" be changed to "student" so that it includes not only children but adults as well.

Response. Section 106(a)(10) requires that the use of funds for the handicapped under section 110(a) of the Act be consistent with section 613 of the Education of the Handicapped Act. Section 613 requires an individualized educational program for handicapped children in certain age ranges and does not apply to any person over 21 years of age. Accordingly, to be completely consistent with the Handicapped Act, and to make clear that the applicability is to children, not adults, it is appropriate to refer to "child" rather than "student." No change is made in the regulation.

§ 104.182(f) *Additional citations.*

Comment. A commenter suggested that the applicability of Section 504 of the Rehabilitation Act of 1973 be specified. Another commenter suggested that "and the Education for All Handicapped Children Act of 1975" be added to the last sentence of § 104.182(f).

Response. The correct citation is the Education of the Handicapped Act, which was amended by the Education for All Handicapped Children Act of 1975. With respect to the applicability of Section 504 of the Rehabilitation Act of 1973, the Department promulgated final regulations on May 4, 1977, at 42 F.R. 22676. This regulation, which applies to all recipients of Federal assistance from HEW, including State Departments of Education and local educational agencies receiving vocational education funds, is intended to ensure that their federally assisted programs and activities are operated without discrimination on the basis of handicap.

§ 104.183 *Assessment of employment opportunities.*

Comment. A commenter requested that the assessment of current and future needs for workers specify workers "of all ages."

Response. While there is some rationale for specifying the need for workers by age, it does not seem appropriate to go beyond the Act in mandating these data. Further, it is doubtful whether the data are readily available. No change is made in the regulation.

§ 104.184 *Limitation to four specified elements.*

Comment. A commenter suggested that § 104.184 limits unduly the flexibility of the plan and recommended that the words "at least" be added after "of" in the first paragraph. The regulation would then read: "This description shall be in terms of at least the following four elements * * *."

Response. The State may include in the plan any information it desires beyond that specified in the regulation as long as mandated requirements are met. Therefore, the State may describe its goals in terms of additional elements beyond the four elements specified. No change is made in the regulation.

§ 104.184(c) *Allocation of funds by institution.*

Comment. A commenter recommended that the regulation be changed to read "various types of institutions" instead of "various institutions." Other commenters felt that reporting program allocations by school district would result in too much detail.

Response. The first recommendation is accepted. The added language will clarify the intent of the regulation. In response to the second comment, only the annual program plan includes the proposed distribution of funds listed by eligible recipient and is mandated by section 108(b) of the Act. The five-year State plan includes allocation of funds by various types of institutions.

§ 104.184 (c) and (d) *Inclusion of CETA as an institution.*

Comment. A commenter suggested including CETA in "among the various institutions of the State."

Response. The provision for coordination with CETA is set forth in § 104.188. Furthermore, CETA is not an institution, and the Act provides no authority for including it with the "various institutions of the State." No change is made in the regulations.

§ 104.185(a) *Meaning of "as precisely as possible."*

Comment. A commenter asked what the phrase "as precisely as possible" means and asked if each State is to make its own interpretation. Another commenter suggested the deletion of the words "as possible" from the phrase in order to clarify the meaning.

Response. The recommendation to delete "as possible" from the phrase is accepted. Section 104.185(a) and 104.186 (a) and (c) will read: "set forth precisely." In light of this modification, the term does not appear to need further interpretation.

§ 104.186(c) *Special needs of older people.*

Comment. A commenter suggested that § 104.186(c) specify that the State plan must set forth funding to meet the special needs of older people, including persons over 65 years of age.

Response. The definitions of the handicapped and the disadvantaged do not identify specifically "older persons." The definitions include persons of all ages having special needs which cannot be met in the regular vocational education program without special assistance. While there is nothing to preclude the use of these funds for older persons, provided they meet the specific requirements, there is no statutory basis for including them as a separate category. No change is made in the regulation.

§ 104.186(d) *Matching set-aside funds.*

Comment. A commenter recommended that paragraph (d) of § 104.186 be deleted, since neither Section 107 nor Section 110 of the Act requires State and local matching funds for this purpose to be included in the five-year State plan. It was suggested that documentation regarding the matching requirements be included in the accountability report.

Response. While the matching of funds for the national priority programs is not specifically required in Section 107 of the Act, nor in the accountability report, it is essential to include this information in order to provide a complete plan of uses of all Federal, State, and local funds. It should be noted that the annual program plan and accountability report constitute an updating and tracking of the five-year State plan. No change is made in the regulation.

§ 104.187 *Eradicating sex discrimination.*

Comment. Several commenters observed that the mandate to simplify regulations has been carried to the extreme and recommended that this regulation spell out in detail how vocational opportunities, particularly for women, will be expanded. One of the commenters stated that the State plan should include (1) an assessment of the current status of vocational education with respect to equality of access to and equality of use of vocational education programs by both sexes, and (2) goals and timetables for achieving the changes the State intends to make. Another commenter recommended that States establish an incentive system in which priority is given to LEA applications that indicate both strategies and the commitment to overcome sex bias and sex stereotyping. Commenters also charged that public comments on the Notice of Intent issue of incentives were ignored and believe that incentives are necessary. Another commenter suggested that the reference to "both men and women" is not compatible with § 104.75 (d).

Respone. The regulation outlines the requirements of the Act but purposely allows the State ample flexibility in meeting these requirements. It is anticipated that the content of the five-year State plan will be improved, particularly in the area of elimination of sex bias and sex discrimination, by updating through the annual program plan as a result of the activities of the personnel under § 104.75. Regarding incentives, the State is required by the Act to provide incentives for eligible recipients but has flexibility in developing a system of priorities for these incentives. The reference to "both men and women" is taken directly from the Act. No change is made in the regulation.

§ 104.187 *Eradicating sex discrimination.*

Comment. A commenter suggested that the term "eradicate" is a strong mandate for something which vocational education may have little control over and should be changed to a less strongly worded intent.

Response. The term "eradicate" as used in relation to sex discrimination is from the legislative history and appears to be synonymous with the term "overcome" used in the Act. No change is made in the regulation.

§ 104.187(a) *Quota for equal access.*

Comment. A commenter recommended that the words "but not necessarily quotas" be added in the sentence following "to ensure equal access."

Response. It is not appropriate for the regulations to require quotas for enrollments in vocational education programs. The States are required to set forth in detail their policies and procedures "to ensure equal access." Although some States may apply a system of quotas as part of these procedures, it is not mandated by the Act or regulations. No change is made in the regulation.

§ 104.187(a) *Time for planning.*

Comment. A commenter objected to including the requirements of § 104.187(a) in the five-year State plan due on July 1, 1977, since funds are not yet available for the persons who will do the work.

Response. The Commissioner is not authorized to waive this requirement for the initial year of the legislation. Although it is probable that, when in place, the full-time personnel to eliminate sex bias will work on this section of the plan, there is no requirement in the Act regarding who will develop this section of the plan. States have been encouraged to develop the best possible State plan in the limited time available and according to the requirements of the Act. The five-year State plan may be improved through the annual program plan updating or by amendment during the year. No change is made in the regulation.

§ 104.187(a)(2)(ii) *Sex stereotyping.*

Comment. A commenter suggested that § 104.187(a)(2)(ii) be changed to read: "Develop model programs to reduce sex stereotyping in training for all occupations," rather than "to reduce sex stereotyping in all occupations."

Response. The recommendation is accepted. While vocational education programs may not directly influence the reduction of sex stereotyping in all occupations, developing model programs which prepare persons of both sexes for occupations may have a positive impact on reducing sex stereotyping in occupations. Accordingly, inserting "in training for and placement in all occupations" will assure that the program proposed by the eligible recipient will focus on the reduction of sex stereotyping.

§ 104.188 *Coordination with CETA.*

Comment. Several commenters expressed concern about the implementation of coordination between vocational education and CETA. One commenter suggested that additional agreements may be needed at the national level. Another commenter suggested that the required "description of the mechanism established for coordination" may be reduced to mere observance of form. The recommendation was that more concrete links, such as mutual signature of plans, should be required.

Response. Section 104.188 requires the five-year State plan to describe the mechanism established for coordinating vocational education programs with manpower training programs. While only this description of the working relationship is required in the five-year State plan, the annual program plan in § 104.222(e) requires reporting of the results of the coordination annually in order to assure consistency from year to year. In addition, the statutorily created National Occupational Information Coordinating Committee will provide for coordination between vocational education and CETA at the national level. At the State level, a representative of the State Manpower Services Council is required to be a member of the planning group for the State plan, of the State Advisory Council, and of the State occupational information coordinating committee. Since the regulation repeats the language of the Act, the States are free to include in the plan those concrete links, such as mutual signatures, which they consider desirable. No change is made in the regulation.

DEVELOPMENT OF ANNUAL PROGRAM PLAN AND ACCOUNTABILITY REPORT

§ 104.203 *Due date of accountability report.*

Comment. A commenter felt that too much time is allowed between the end of the fiscal year and the due date of the accountability report for that fiscal year. The commenter felt that current program information could be provided in less than the nine months the proposed regulation allows.

Response. Some of the data included in the accountability report will be reported earlier in the vocational education data system to the National Center for Education Statistics for use in preparing the annual report to Congress and other purposes. Thus, certain data will be available sooner than the July 1 deadline. Section 108(b) of the Act, however, requires submission of the accountability report with the annual program plan on the July 1 preceding the beginning of the fiscal year for which the plan will be effective. This accountability report will list the accomplishments achieved during the fiscal year preceding the submission of the plan and report. No change is made in the regulation.

§ 104.22 *Annual program plan for 1978.*

Comment. A commenter recommended that reference to §§ 104.183 and 104.184 be included in § 104.221. The commenter also felt that the requirement to include in the State plan the proposed distribution of funds among eligible recipients is an unreasonable burden and suggested that this requirement be deleted.

Response. The first recommendation is accepted. The reference to §§ 104.183 and 104.184 was inadvertently omitted from the NPRM. Section 104.221 is rewritten to include a reference in the second line to §§ 104.183 and 104.184.

In response to the second suggestion, the regulation follows the language of section 108(b)(1)(B)(ii) of the Act which requires the State plan to show the distribution of funds among eligible recipients. Therefore, this requirement cannot be deleted.

§ 104.222 *Five-year State plan update.*

Comment. Two commenters requested clarification regarding the yearly update of the five-year State plan. It was suggested that the five-year plan would stand as submitted with the annual program plan reflecting changes anticipated or projected which could affect the outcomes of the five-year plan.

Response. The five-year State plan will stand as it is submitted. The annual program plan will update any obsolete or inaccurate information in the five-year State plan relating to employment needs and goals for meeting these needs. The annual program plan will also include a more detailed description of how the funds projected in the five-year State plan will be used and any changes in funding proposed, along with the reasons for those changes. No change is made in the regulation.

§ 104.261 *Review of plans by full-time personnel to eliminate sex bias.*

Comment. A few commenters suggested that the full-time personnel to eliminate sex bias certify that they have made comments and recommendations on the State plan in addition to certifying that they have been afforded an opportunity to review the plan.

One commenter felt that it should be stated that the certification did not necessarily constitute an endorsement of the plan. Another commenter stated that the full-time personnel will not be employed until October 1, 1977, and therefore, cannot review the 1978 plan.

Response. In accordance with section 109 (a)(3)(B), the certification in § 104.261(d) provides evidence to the Commissioner that the opportunity to review the plan was afforded the full-time personnel. This certification does not preclude inclusion of any comments the full-time personnel wish to make. Indeed, one of the functions of personnel under § 104.75 is to make information readily available to the State board and the Commissioner. Comments on the State plan may be submitted with the certification or at any other convenient time. By certifying that an opportunity to review the plan was afforded, the full-time personnel are not necessarily endorsing the content of the plan. It is recognized that all States may not have the full-time personnel employed until October 1, 1977; nevertheless, it is the responsibility of the State to assure that the plan is in compliance with the Act. No change is made in the regulation.

§§ 104.261 and 104.262 *Criteria for approval of plans.*

Comment. A commenter asked if criteria will be developed to assist the Commissioner in determining that the State has set forth adequate procedures to carry out the general application assurances and the provisions of the plan.

Response. The requirements of §§ 104.182 through 104.188 and §§ 104.221 through 104.241 are detailed enough to provide adequate criteria on the basis of which the Commissioner can determine whether the State is in compliance with the Act. No change is made in the regulation.

§ 104.262(f) *Content of accountability report.*

Comment. A commenter recommended that the accountability report include course enrollment by race and by sex. It was contended that the report would be inadequate if it reports race and sex data without cross-tabulating them.

Response. To reduce duplication of reporting, the accountability report is not required to include program enrollment data by race or sex. These types of data will be supplied in the vocational education data system developed under section 161 of the Act. The data, therefore, are available to the State and may be included in the accountability report if desired. No change is made in the regulation.

§ 104.271 *Disapproval of plan.*

Comment. A commenter requested clarification of § 104.271(b) providing that the Commissioner will not disapprove a State plan solely on the basis of the distribution of State and local expenditures. The commenter asked which sections of the Act are covered by this provision.

Response. Since there is no legislative history to indicate otherwise, it is assumed that § 104.271(b) applies to all State and local expenditures for vocational education. Therefore, no change is made in the regulation.

HEARINGS BEFORE THE COMMISSIONER ON AGENCY OR COUNCIL CHALLENGES TO THE FIVE-YEAR STATE PLAN OR ANNUAL PROGRAM PLAN

§ 104.281 *Cost of appeal to the Commissioner.*

Comment. A commenter suggested that the cost of an appeal to the Commissioner should be borne by the agency bringing the appeal, particularly the cost of travel of the agency's representative.

Response. The cost principles governing the vocational education State-administered program are contained in Appendix B to 45 CFR Parts 100–100d. In general, these principles provide that a cost of the grant program may be reimbursed with Federal funds if the cost is necessary and reasonable for the proper and efficient administration of the program, unless specifically provided otherwise by Federal law and regulation or State or local law.

With respect to the legal expenses incurred during a section 107 appeal between two State agencies to the Commissioner, item 16 in Appendix B (45 CFR Parts 100–100d) is controlling. In accordance with this provision, if the legal services for the appeal are furnished by the State's Attorney General or staff, the costs would be unallowable because these attorneys would be discharging their general responsibilities. If one of the State agencies, however, retains private counsel because of a conflict of interest situation arising due to the State Attorney General representing two State agencies in an adversarial capacity, the legal expenses are allowable as a bona fide State administrative expense.

The travel costs of the agency representative involved in the appeal proceeding are also allowable in accordance with the principles contained in item 28 of Appendix B (45 CFR Parts 100–100d).

Since these principles are contained in the General Education Provisions Regulations, which are directly applicable to the Vocational Education Act, no change is made in the regulation.

§ 104.283(a) *Hearing officer.*

Comment. A commenter suggested there should be more than one hearing officer on a panel to hear an appeal to the Commissioner from agencies and council on State plans, as two or more hearing officers could share the responsibilities.

Response. Appeals on State plans should be heard promptly so that the plan may become effective as soon as possible. Although experience has indicated that it is difficult to obtain the services of hearing officers at short notice because of their prior commitments, it should be possible to obtain one experienced hearing officer in the prescribed time. However, if more than one hearing officer were to be used, three would be needed in order to avoid the possibility of a one-to-one tie vote. No change is made in the regulation.

§ 104.286 *Criteria for Commissioner's decision on appeal.*

Comment. A commenter suggested that the proposed regulations "completely miss the point" in not setting out objective criteria so that interested parties will know in advance by what standards an appeal to the Commissioner will be judged, and so that the criteria can be uniformly applied to all States engaged in appeals to the Commissioner.

Response. The Act (section 107 as to the five-year State plan, section 108 as to the annual program plan) does not require, or authorize, the Commissioner to set criteria for the Commissioner's decision. The Act says that the Commissioner shall afford an opportunity for a hearing and "shall determine whether the State board's decision is supported by substantial evidence, as shown in the State plan, and will best carry out the purposes of the Act." Substantial evidence is a legal term which is used in relation to the standard for judging evidence in administrative hearings and on appeals to the courts. The regulation (§ 104.286(c)) uses the legal term and gives it the meaning given by the Supreme Court in the case of *Consolidated Edison Co. vs. National Labor Relations Board* at "305 U.S. 197, 229 (1938)." This definition of "substantial evidence" has been cited and followed in numerous administrative hearings and court cases since it was defined by the Supreme Court in the 1938 opinion. The legislative history in relation to the hearing (House Report No. 94–1085; Senate Report No. 94–882, p. 76; Conference Report No. 94–1701, p. 221) makes no reference to separate criteria.

Since it cannot be anticipated what part of the State plan may be the subject of the appeal, it would be very difficult, if not impossible, to set criteria, as recommended by the commenter, in relation to every possible appeal for the source of the evidence, the purposes of the Act, or for determining what the Commissioner believes will best carry out the puposes of the Act. No change is made in the regulation.

§ 104.287 *Determinations on appeal.*

Comment. The same commenter objected to the requirements in § 104.287(a)(1)–(4) as being "a farce."

Response. These requirements are based on language in section 107(a)(1) of the Act and repeated in § 104.287(a)(1). The Act and the regulation first require the hearing officer to determine whether the procedures of that section (section 107(a)(1)) have been followed. Then § 104.287(a)(2) requires a finding that the State board's plan is legal. Paragraph (a)(3) repeats the "substantial evidence" rule of section 107(a)(1), and paragraph (a)(4) repeats the standard that the hearing examiner determine that the State board's decision (rather than the appealing agency's recommendations) "best carry out the purposes of the Act."

As to purposes, section 101 of the Act entitled "Declaration of Purpose" states the purpose of the Act, and the legislative history should also be reviewed to determine the purposes of the Act. It is the opinion of the Commissioner that any attempt to restate the purposes of the Act as criteria for any appeal to the Commissioner would in effect be limiting and would be substituting the Commissioner's view of the purposes for that expressed by the Congress. No change is made in the regulation.

§ 104.288(c) *Commissioner's decision on appeal of the State plan.*

Comment. A commenter suggested that if the Commissioner disapproves a State plan, the disapproval must be "based on a review of the entire plan."

Response. The Commissioner (through the hearing officer) will review the recommendations about the State plan made by the appealing agency or council and the State board's reasons for rejecting the recommendations. Depending on the nature of the recommendations, this may not require a review of the entire State plan. The language in § 104.288(c) is based on language on page 216 of the Conference Report which says that, if the Commissioner does not approve the part of the plan in contection, the Commissioner does not rewrite the plan, but disapproves of it "in its entirety" and returns it to the State board for revision. No change is made in the regulation.

§ 104.289 *Appeal of the Commissioner's action to the Court of Appeals.*

Comment. With respect to the section 107(a) appeal, a commenter pointed out that § 104.289 of the regulation states that a "State board, agency, or council" may appeal the final action of the Commissioner to the Court of Appeals, whereas section 107(a) of the Act states only that any "agency or State

board" may appeal to the Court of Appeals.

Response. The regulation is amended to use the exact language of the Act. The right to appeal to the courts must depend on the language of the Act, not upon different language in the regulation. The House Report (H. Rept. No. 94–1085, p. 36) states: "After the Commissioner makes this determination, any dissatisfied agency or State board (but not the State advisory council on vocational education or the State Manpower Services Council) may appeal the Commissioner's decision to the Federal circuit court of appeals."

FISCAL REQUIREMENTS

§ 104.301 *Zero-based budgeting.*

Comment. A commenter, after pointing out that zero-based budgeting forces programs to analyze periodically their goals and objectives, to evaluate results regularly, and to spotlight duplication of effort, recommended that the regulation require zero-based budgeting by both Federal and State programs.

Response. In keeping with the general practice that the regulations do not regulate internal Federal matters, a statement that the Office of Education shall use zero-based budgeting is not set forth in the regulation. As to the States, a requirement in the regulation that the States adopt zero-based funding would interfere unduly in the States' own administrative matters. Therefore, no change is made in the regulation.

FEDERAL SHARE

§ 104.301(d) *Matching in-kind.*

Comment. A commenter asked whether the prohibition against using in-kind contributions to meet the matching and maintenance of effort requirements applies to both State and local levels.

Response. Section 104.301(d) provides that only actual expenditures of State and local funds shall be accepted as part of the State's matching and maintenance of effort requirements. This means that the prohibition against the use of in-kind contributions applies to both State and local levels. No change is made in the regulation.

§ 104.302 *Distribution of funds for men and women.*

Comment. A commenter suggested that the distribution of Federal funds should be controlled so that the availability of funds to men and women is equal.

Response. The Commissioner is prohibited by section 421A(c)(2)(B) of the General Education Provisions Act from imposing a funding distribution method different from that specified in the law authorizing the appropriation. Since the Act contains no authority for distributing funds equally among men and women, the Commissioner is not authorized to require it by regulation. No change is made in the regulation.

§ 104.302(a) *Matching requirements.*

Comment. A commenter stated that the 50 percent matching provision in § 104.302 (a) is in error because some program sections allow 90 percent.

Response. Section 104.302(a) contains the general statutory matching requirement in section 111(a) that the Commissioner will pay to each State an amount not to exceed 50 percent of the cost of carrying out its annual program plan. The exceptions to this general requirement are enumerated in other regulatory sections. Since the fiscal regulations are interdependent and must be read together, it is unnecessary to list all the exceptions to the general 50 percent requirement in one section of the regulation. No change is made in the regulation.

§ 104.303 *Matching for national priority programs.*

Comment. Many commenters recommended that the 50 percent matching requirements for programs for the handicapped and disadvantaged as set forth in § 104.303 be reconsidered. These commenters have stated that it is inequitable for the State and local school districts to pay 50 percent of the cost of these programs when they are already supporting vocational educational education at such a high percentage. To expect State and local programs to adhere to these matching requirements when the proportion of Federal funding is so small is unrealistic.

Response. Section 110 of the Act provides that Federal funds shall be used to pay up to 50 percent of the excess of programs, services and activities for handicapped and disadvantaged persons. Section 104.303 of the regulation is based directly on this statutory provision. Section 421A(c)(2)(B) of the General Education Provisions Act (the Cranston Amendment) prohibits any funds to be apportioned, allocated, or otherwise distributed in any manner or by any method different from that specified in the law. Accordingly, no change is made in the regulation.

§ 104.303(c) and § 104.314 *Postsecondary and adult programs.*

Comment. Several commenters have pointed out that the word "and" is omitted between paragraphs (1) and (2) of § 104.303 (c) and between paragraphs (a) and (b) of § 104.314 and recommend that it be added.

Response. This recommendation is accepted. The final regulation has added the word "and" between paragraphs (1) and (2) of subsection § 104.303 and between paragraphs (a) and (b) of § 104.314. Accordingly, in § 104.303(c) the Commissioner will pay an amount not to exceed 50 percent of the cost of both postsecondary *and* adult programs. In § 104.314, the State shall expend 15 percent of the section 102(a) allotment for both postsecondary *and* adult programs.

§ 104.303 *Mainstreaming requirements.*

Comment. A commenter suggested a new paragraph (d) be added to § 104.303 to read "Each State shall use, to the maximum extent possible, the funds required to be used for the purposes specified in subsections (a) and (b) to assist individuals described in those subsections to participate in regular vocational education programs."

Response. The mainstreaming requirement for handicapped persons is contained in § 104.312. The mainstreaming requirement for disadvantaged persons and persons of limited English-speaking ability is set forth in § 104.313(b). Since the inclusion of these provisions into § 104.303 would result in a duplication, no change is made in the regulation.

§ 104.305(a)(3) *Administrative costs.*

Comment. A commenter requested the deletion of the phrase "excluding State administration and ancillary services" in subparagraph (3) of § 104.305(a). The commenter pointed out that the Act has no such limitation.

Response. The comment has been accepted. Section 140(b)(1) of the Act provides that the State shall use Federal funds allocated for the Special Programs for the Disadvantaged to pay the full cost of vocational education for disadvantaged persons. Since State administration and ancillary services may be characterized as part of the full cost of the programs, expenditures for the administration of the program and ancillary services directly related to the program may be attributed to the section 102(b) allotment.

MINIMUM PERCENTAGES

§ 104.312 *Minimum percentage for the handicapped.*

Comment. A commenter suggested that because Part B of the Education of the Handicapped Act, as amended by the Education for All Handicapped Children Act of 1975, Pub. L. 94–142, mandates that each individual handicapped person be served in the "least restrictive environment," the regulation should require the States to use section 110(a) funds to the maximum extent possible to assist handicapped persons to participate in vocational education programs provided in the "least restrictive environment."

Response. Section 612(5) of Pub. L. 94–142 requires the State to establish procedures to assure that special classes or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. Since funds used for the purposes of section 110 (a) of the Vocational Education Act must be consistent with the State plan submitted pursuant to section 613(a) of the Education for All Handicapped Children Act, the statutory requirement on least restrictive environments is binding on section 110(a) of the Vocational Education Act. Furthermore, § 104.182(f) of this regulation requires the vocational education programs for handicapped children to be planned and coordinated in conformity with and as a part of the child's individualized education program as required by the handicapped legislation. Therefore, no change is made in the regulation.

§ 104.313 *Minimum percentage for the disadvantaged.*

Comment. Many commenters expressed concern over the inconsistency in § 104.313 (a) and the overview of the regulations in the Notice of Proposed Rulemaking. Section 104.313(a) provides that the State shall expend "at least" 20 percent of the section 102(a) allotment for the disadvantaged. The overview of the regulations at 42 FR 18542 states "up to 20 percent."

Response. The statement contained in the overview concerning the minimum percentage for the disadvantaged is incorrect. The text should read "at least 20 percent to pay up to 50 percent of the costs of programs for the disadvantaged * * *" Since the language in § 104.313(a) is correct, no change is made in the regulation.

§ 104.313 *Minimum percentage for the disadvantaged.*

Comment. A commenter expressed a view that the proposed rules, which allow the local educational agencies to charge the cost of vocational education programs for the disadvantaged, would result in supplanting of funds. According to this commenter, a strong possibility exists whereby the schools in economically disadvantaged areas will take students who succeed in regular programs, identify them as disadvantaged, and charge the set-aside for complete teacher salaries. In order to avoid supplanting, the commenter suggested that an individualized plan for each disadvantaged student be developed which would indicate that supplemental assistance is essential to enable that student to succeed in the regular program.

Response. The term "disadvantaged" is defined in Appendix A. In accord with this definition, a disadvantaged person must re-

quire special services and assistance in order to succeed in vocational education programs. Students who can succeed in the regular vocational education program are not eligible for funding under the minimum percentage for the disadvantaged.

Furthermore, the dollar for dollar matching provision required by section 110(b) of the Act for programs for the disadvantaged would seem to preclude any possibility of supplanting of funds. The statutory "no-supplant" provision in § 108(a)(6) is designed to assure that the aggregate of State and local funds available for a specific purpose, such as the disadvantaged set-aside, is not reduced because of the receipt of Federal funds under the Act. Therefore, as long as the combined State and local funds match the Federal funds earmarked for the purposes of section 110(b), it is unlikely that a violation of the "no-supplant" requirement would occur.

The suggestion for requiring an individualized plan for the disadvantaged, as required for the handicapped, may be found desirable by some States but it is not mandated by the Act. Since this procedure is not required by the Act, it is not appropriate to be included in the regulation. Thus, no change is made in the regulation.

§ 104.313(b) *Minimum percentage for the disadvantaged.*

Comment. A commenter stated that because of the history of minorities and the disadvantaged in vocational education, it is critical for the regulation governing the national priority program for the disadvantaged to offer disadvantaged students a genuine opportunity and not the traditional "dumping ground." In order to accomplish this objective, the commenter suggested incorporating into the regulation reporting requirements on criteria for selecting students, the kinds of programs available, needs assessments, evaluation tools, and enrollment data.

Response. The suggestions offered by this commenter are already an integral part of the regulation. The criteria are set forth in Appendix A; the regulations contained in §§ 104.183 through 104.188 govern the various requirements pertaining to kinds of programs, needs assessments, and enrollment data; and §§ 104.401 through 104.405 set forth the program evaluation requirements. Since the commenter's recommendation is incorporated into the regulation, no change is made.

MAINTENANCE OF EFFORT

§ 104.323 *Reductions in expenditures.*

Comment. A commenter questioned the basis in §§ 104.323 and 104.324 for permitting reductions in expenditures for vocational education. The commenter contends that any reduction would be a violation of section 111(b) of the Act.

Response. The term "fiscal effort" as used in section 111(b) is not defined in the Act or in the legislative history. For the purpose of this regulation, therefore, the term relates to tax effort and takes into account the relationship between tax rate and tax base. If the tax base declines but the tax rate remains constant, fiscal effort is considered to be maintained even though the tax yield declines proportionately. If, on the other hand, section 111(b) was written in terms of absolute spending levels, rather than fiscal effort, then the regulation would not permit any flexibility or deviation from the base year.

Since in the Act the funding requirement is stated in terms of maintenance of fiscal effort, a tolerance of five percent or less, as set forth in § 104.323, can be justified on the grounds that the State's effort can be said to be sustained although there was a minor decrease in actual spending levels. An allowance of any more than five percent would risk transgressing statutory intent.

Similarly the unusual circumstance rule in § 104.324 is justified because an event which is out of the control of the State does not reflect a diminished fiscal effort. An event warranting such an exception must be unusual in the sense that the grantee clearly could not have anticipated it or compensated for it.

Accordingly, no change is made in the regulation.

STATE EVALUATION

§ 104.402 *Evaluation requirements.*

Comment. Several commenters were concerned by what they perceived as the excessive burden of performing all of the kinds of evaluation listed in § 104.402 (a), (b), and (c). Some recommended that subsections (a) and (b) be deleted for that reason. Other commenters wanted additional criteria such as "job mobility" and "student satisfaction." Several urged that the States be allowed to choose whether or not to use the suggested criteria. Most of these commenters wanted the State board to be free to determine and use the criteria for program and project evaluation which it considers to be most appropriate.

Response. It should be noted that while the Act requires evaluation during the five-year period of the effectiveness of each program or project, the numbered examples in paragraphs (a), (b), and (c) are only suggestive and the lists are not exhaustive. Therefore, with respect to § 104.402, the States already have the freedom of action described and desired by these commenters. The extent of the burden of evaluation will be determined largely by the State board. No change is made in the regulation.

§ 104.402 *Use of sampling for evaluation.*

Comment. Several commenters urged that the States be allowed to use sampling techniques in evaluating the effectiveness of their programs and projects of vocational education.

Response. The regulation does not preclude use of reasonable sampling procedures for the purposes of § 104.402. Therefore, the regulation has not been modified.

§ 104.402 *Evaluation of State and local programs.*

Comment. A commenter objected to the required inclusion of State- and locally-supported programs and projects in the evaluation, on the grounds that the Act does not contain this requirement.

Response. Paragraph (c) of § 104.301 states that "* * * every program or activity supported in whole or in part by State or local funds which are used to match Federal funds must meet the same conditions and requirements as those supported by Federal funds." Therefore, State and locally supported programs and projects cannot be exempted from the requirement. Thus, no change is made in the regulation.

§ 104.402 *Employer satisfaction.*

Comment. One commenter urged that the regulation permit and encourage the States to secure data on employer satisfaction and student performance by any means considered appropriate by the State, including surveys conducted by local educational agencies.

Response. Except for the data on program completers and leavers required by § 104.404, the States may perform the evaluations required by § 104.402 by any appropriate procedures. Therefore, the regulation has not been amended in this regard.

§ 104.402 *Financial and legislative limitations.*

Comment. One commenter urged the inclusion of evaluative criteria related to the financial limitations and other limitations set by the State's legislature.

Response. Since the lists of numbered criteria in § 104.402 (a), (b), (c), and (d) are only suggestive and not exhaustive, the States are already free to use additional criteria in their evaluation of program and project effectiveness. No change is made in the regulation.

§ 104.402 *Qualitative versus quantitative.*

Comment. A commenter finds confusing the requirement that program effectiveness and other essentially qualitative factors should be evaluated in quantitative terms. The recommendation is that the regulation be amended to read "* * * evaluate in quantitative and/or qualitative terms as appropriate * * *."

Response. The intent of the regulation is that the report of the evaluations be expressed in objective terms that facilitate verification and make possible the aggregation of data within a State and across States, rather than in subjective, impressionistic terms. For example, instead of describing services to women students in qualitative terms of "excellent" and "cooperative" attitudes and efforts of the staff, the regulation means to encourage reporting the facts as the number of women who enrolled in and completed each course traditionally reserved for men, the comparative numbers of men and women in the courses, and the number of each sex who found (or were placed in) employment in the field of training. The same kind of objective reporting would apply to all programs and projects supported under the Act. The recommended change is therefore not accepted because it would seem to encourage less objective and less useful kinds of reporting. No change is made in the regulation.

§ 104.402 *Services to special populations.*

Comment. A commenter found § 104.402 (d) "particularly inept and confusing" and recommended that services to women, members of minority groups, handicapped persons, and disadvantaged persons be measured by the same criteria used for measuring services to other students.

Response. The criticism is well taken. The intent of the regulation was that service to the named "special populations" should be measured by the same criteria as are used with all other students, and that in addition the State's evaluation would report on any other services provided for those special groups. The proposed regulatory language is not clear, and § 104.402(d) has been amended to read "The results of additional services as measured by the suggested criteria under paragraphs (a), (b), and (c) of this section, that the State provides under the Act to these special populations:"

Comment. A commenter recommended that paragraph (d) of § 104.402 be amended to mandate evaluation of the effectiveness of services to the special populations named there instead of making that part of the evaluation optional.

Response. The recommendation is accepted because the law not only requires evaluation of the effectiveness of all programs, projects and activities assisted under the Act, but also gives particular emphasis to those special populations. As amended, paragraph (d) becomes mandatory. In keeping with this rationale, a fifth special population category "persons of limited English-speaking ability" is added to paragraph (d).

§ 104.402 *Services to the handicapped.*

Comment. A commenter recommended that for each handicapped student, the State be required to include in its evaluation information about the instructional environment of the student, identification of the handicapping condition, and the specific occupational program in which the student is enrolled.

Response. The act provides no basis for requiring these data, and there is provision in other legislation, e.g., the Education of the Handicapped Act, as amended by the Education for all Handicapped Children Act of 1975, for reporting on services to handicapped students. Therefore, no change is made in the regulation.

§104.402 *Fluctuations of the economy.*

Comment. A commenter wanted the State's evaluation of the extent of placement of vocational education students in jobs to take into account changing economic conditions which affect the job market.

Response Although the intent of such an amendmen is meritorious, the recommendation is not accepted, because it would increase with t statutory justification the already heavy burden borne by the State boards. The State board is, of course, free to take changing economic conditions into consideration in making the evaluation if it chooses to do so. No change is made in the regulation.

§ 104.404 *Follow-up of all students.*

Comment. One commenter interpreted § 104.404 to mean that follow-up data should be secured for only those "completers" and "leavers" who find employment, and urged that the follow-up survey both those employed and those unemployed.

Response. No modification of the regulation is required, since § 104.404(b)(1) will show whether or not the completer or the leaver found employment and whether the employment was or was not related to the vocational training.

§ 104.404 *Definition of program leaver.*

Comment. Two commenters recommended deletion of § 104.404(c)(2)(ii), "all other leavers," on the grounds that the inclusion of that part of the definition would require follow-up of students, for example, who enroll in a single vocational education course and leave two weeks later. This would impose an unreasonable burden if such a leaver must be included in the follow-up survey.

Response. The Commissioner is aware of the problem posed by students whose enrollment is of such limited duration that they should not be counted in any survey of program leavers. However, instead of setting by regulation a maximum duration of enrollments that are not to be counted, the Commissioner prefers that such guidance be furnished as part of the instruction for submission of required reports and data. No change is made in the regulation.

Comment. A commenter recommended changing the definition of "program leaver" to say that the leaver has nevertheless "acquired sufficient entry-level job skills to work in the field for which he or she was trained."

Response. It is the view of the Commissioner that the recommended change would eliminate from consideration in the evaluation and reporting those persons who do not acquire entry-level job skills either because they have not learned satisfactorily or have not been taught satisfactorily. It is believed that failure to include these persons in the report would violate the intent of the Congress. Therefore, no change is made in the regulation.

Comment. A commenter suggested that the definition of "program leaver" should be made parallel to the definition of "program completer" by adding in § 104.404(c)(2) that program leaver means a student who has been enrolled in and has attended a program of vocational education "which purports to teach entry level job skills."

Response. This suggestion has been accepted. It was intended that the definitions of "program completer" and "program leaver" be parallel. It was also intended to include the phrase "which purports to teach entry level job skills" in both definitions. The regulation has been amended accordingly.

§ 104.404 *Instructions by National Center for Education Statistics.*

Comment. Two commenters asked whether the NCES instructions and standards referred to in § 104.404(d) are mandatory or whether the State may choose to use a different reporting system.

Response. Use of the NCES instructions and standards is mandatory. The Act (sec. 161(a)(3)(B)) emphasizes and mandates reporting on program "completers" and "leavers." Without a uniform data reporting system it would not be possible to aggregate and report the data across States (i.e., nationwide). No change is made in the regulation.

§ 104.404 *Exclusion of homemaking job skills.*

Comment. Two commenters wanted the reference in § 104.404(a) to "entry-level job skills" to be expanded thus: "which purports to teach entry-level job skills, not to include the occupation of homemaking," on the grounds that it is unreasonable to try to evaluate the adequacy of training for homemaking.

Response. "Entry-level job skills" is interpreted as referring solely to paid employment, which eliminates from consideration homemaking by either spouse or parent. Homemaking by a paid housekeeper, nursemaid, or other such paid employee would be treated in the same way as any other gainful employment. No change is made in the regulation.

§ 104.404 *Scrutiny of teaching materials.*

Comment. A commenter urged the Office of Education to improve the effectiveness of program evaluation by examining vocational education courses and teaching materials to determine their "pertinency" and "currency," especially for the future needs of the nation.

Response. It is the view of the Commissioner that the effect of the recommendation would be to involve the Federal government in matters which are the prerogative of the States and local schools. No basis was found in the Act to support the recommendation. Therefore, no change is made in the regulation.

SUBPART 2—BASIC GRANTS

§ 104.502(b) *Distribution of basic grant funds.*

Comment. Many commenters objected to the mandatory reservation of funds under the basic grants in § 104.502(b) for special programs and placement services tailored to meet the need of the special populations described in § 104.621. Some of these commenters were concerned that if funds are reserved for displaced homemakers and other special groups, the remaining funds may be insufficient for vocational education programs described in § 104.511. Other commenters suggested that funding for programs for these special populations be attributed to another section of the law.

Response. Section 107(b)(4)(B) of the Act requires that the State set forth in its five-year plan a program to assess and meet the needs of persons described in section 120(b)(1)(2). This program will provide for special courses for these persons in learning how to seek employment and placement services for the graduates. Therefore, even though the Act attempted to consolidate numerous programs under section 120 to provide greater flexibility and discretion to the State, funding for programs for displaced homemakers as well as for full-time personnel to perform the functions in § 104.75 is mandatory. Funding for the balance of activities listed in section 120 is permissive. Neither the Act nor the regulation, however, requires a minimum funding level for programs for these special populations. The State must earmark an amount of funds it considers adequate to support the courses and services which are described in its five-year plan to meet the needs of these special populations. Accordingly, no change is made in the regulation.

§ 104.502(c) *Support for guidance under the basic grant.*

Comment. A commenter recommended that guidance and counseling be added to the list of purposes for which funds under section 120 of the Act may be used. The rationale for the comment is that guidance and counseling services are essential to the successful placement of individuals in careers.

Response. The Commissioner agrees that guidance and counseling are essential for the successful placement of individuals. However, the Act provides funding for this activity in subpart 3—Program Improvement and Support Services. Section 134 requires the State to expend at least 20 percent of the subpart 3 allotment for guidance and counseling services. Thus, no change is made in the regulation.

§ 104.502(c) *Consolidation of programs.*

Comment. A few commenters perceived the consolidation of the expansive list of programs, services, and activities in § 104.502(c) as a "danger point" because if States can determine their own priorities for funding, low priority may be given to support services for women. These commenters suggested that with respect to programs which may contribute to eliminating sex stereotyping, the regulation should mandate funding.

Response. One of the major purposes of this new Act is the consolidation of numerous programs and activities into a single basic grant. This consolidation allows the State to determine its own priorities for funding. Consequently, there is no legal justification to undo by regulation what Congress specifically directed by statute. Thus, no change is made in the regulation.

§ 104.511(b) *Initial equipment.*

Comment. Many commenters expressed some confusion with respect to the inclusion of "instructional equipment" and the exclusion of "initial equipment" in the definition of vocational education programs in § 104.511(b). Part of the confusion seems to stem from the fact that the definition of "school facilities" in section 195 includes "initial equipment." Some of these commenters requested that the regulation clearly distinguish these terms.

Response. The language contained in § 104.511(b) is based directly on the statutory definition of vocational education in section 195. This definition provides in part that the "term 'vocational education' does not mean the construction, acquisition or initial equipment of buildings." "Initial equipment" includes building fixtures, utilities and furnishings or simply the materials which must be placed in a facility to accommodate the type of instruction or other voca-

tional education purpose for which the facility is designed. Although the definition of "vocational education" does not allow for the purchase of initial equipment, States may use funds under the authority of section 120 (b)(1)(E) (construction of area vocational education school facilities) for initial equipment. It should also be noted that the definition of vocational education allows for the acquisition of instructional equipment. No change is made in the regulation.

§ 104.512(b)(3) *Apprenticeship related instructional programs.*

Comment. A commenter expressed the view that, since apprenticeship-related instructional programs are directly tied to the process of job placement, more than a simple reference to them in § 104.512 should be given. This commenter suggested that a more detailed regulation governing the operation of these programs be adopted.

Response. The comment is accepted. In view of the importance of related instruction to apprentices who are employed to learn trade skills, a new regulation, § 104.515, has been added. The language of this provision is adopted from the regulation promulgated in 1975 by the Commissioner at 40 FR 57730 (December 11, 1975) on this same subject matter. This regulation requires the State to include certain assurances in the five-year plan if apprenticeship-related instructional programs are offered.

These assurances will (1) insure that the vocational training is supplemental to on-the-job training experience of the apprentice; (2) set minimum age standards; (3) require an apprentice training agreement; (4) outline the required characteristics of the skilled trade; (5) specify the classifications of registered and non-registered apprentices; and (6) require conformity with Department of Labor regulations on apprenticeship programs.

§ 104.513 *Student organizations.*

Comment. A great many commenters submitted their views both in writing to the Regulations Task Force and at the public meetings on the subject of vocational education student organizations. Although the vast majority of these commenters expressed their satisfaction with the inclusion of a regulation authorizing the expenditure of funds for activities of vocational education youth organizations which are an integral part of the vocational education programs, many commenters objected to certain aspects of the regulation.

Many commenters objected to paragraph (c) which lists six activities which cannot be considered an integral part of vocational instruction. Some believe that it is entirely unnecessary to regulate on nonreimbursable activities because it is generally assumed that if an activity is not explicitly set forth, it cannot be funded.

A number of commenters expressed disapproval with some of the items listed as nonreimbursable in paragraph (c). Some commenters felt strongly that attendance at conventions, student organization newsletters, and recognition of outstanding performance are all vital elements of the student organization instructional and leadership program. Since these activities are designed to prepare youth to become responsible members of society, these items should be moved into reimbursable activities in paragraph (b). Many members of student organizations either testified at the public meetings or wrote letters explaining that the elements in paragraph (c) represented an important educational function and should be supported financially. One individual testified that students value their awards more than anything.

The one item in paragraph (c) which received the most comment was the prohibition against using funds for lodging, feeding, conveying, or furnishing transportation to conventions or other forms of assemblage. Some commenters pointed out that national and State conventions, culminating the experience of conferences held locally and regionally, provide an excellent educational forum for an exchange of ideas and are an integral part of the instruction. Limiting funds for this purpose will have a negative impact on the future of vocational education.

A few commenters objected to the use of the term "assemblage" in paragraph (c)(1). They felt this term would preclude the furnishing of transportation to any activity in which groups of students come together, including field or laboratory work incidental to the vocational training. Others argued that funds should be available for furnishing transportation to skill competitions which are directly related to the instructional program. Some commenters expressed the view that allowing funds to be used for transportation of students for student organization activities may lead to abuse in the use of funds.

A few commenters stated that the regulations may be fostering a discriminatory policy if the lodging and travel of statewide coordinators are reimbursable, but student costs are not. Others generally questioned whether funds may be used to pay the salaries of statewide coordinators.

One commenter suggested that if Federal funds are to be used to support the cost of instructional supplies and materials for student organizations, then a requirement should be imposed to insure that such materials are free of sex stereotyping. Another commenter recommended that States be required to match dollar for dollar Federal funds used for student organizations.

Many commenters recommended that the regulations be amended to insure explicitly that any activity of an organization funded with Federal dollars be available to all students in the instructional program without regard to membership in the student organization. In this connection, Congressmen Perkins and Quie in the House Committee on Education and Labor stated in a letter to the Commissioner, "We do not believe that any activity can be supported with Federal funds unless all of the students in the instructional program are eligible to participate without regard to membership in any student organization. Otherwise, we feel that the Federal government would be in the untenable position of excluding students from the benefits of a Federally-funded program solely because they do not choose to join a private organization."

A few commenters strongly objected to the use of Federal funds to support any activity of a student organization. They stated that there is no authority in the law or legislative history to support the regulation. In their view, Congress considered and rejected proposals which would have expressly permitted support for such activities.

Still others who expressed strong support for student organizations urged that the Office of Education not control by regulation that which was not deemed necessary to impose by legislation. They argue that the intent of Congress was to leave student organizations out of the law because, "The student organizations are doing fine. It may be doing them a disservice to put them in the Federal law, thus making them part of the system, subject to its structure. Any legislative support is best left to the individual States."

Response. The Office of Education recognizes the educational programs and philosophies embraced by vocational education student organizations as being an integral part of the vocational education system of training. The efforts of these student organizations to improve the quality and relevance of instruction, to develop student leadership and to enhance citizenship responsibilities have equipped and will continue to equip vocational education students with the tools necessary to enter the labor market and to assume successful roles in society. To this end, § 104.513 of the regulations allows that Federal, State, and local funds available under the five-year State plan (subject to the overall matching requirements) may be used to give support to the activities of vocational education student organizations which are directly related to the vocational education instructional programs under the approved five-year State plan. It should be made clear at the outset that, since the activities of student organizations are not explicitly authorized in the Act, the activities can only benefit from the vocational education program to the degree to which the activity is directly integrated into the regular instructional program.

It has been apparent to the Office of Education that this national policy on student organizations has been interpreted differently by the States. Some States have construed the policy in earlier regulations broadly to reimburse all student organization activities. Other States have adopted a very limited view of specific activities which are reimbursable. As a result of this demonstrated ambiguity, the Commissioner has decided to provide the States with uniform guidance on reimbursable activities of student organizations. This guidance was set forth in proposed form in § 104.513 of the Notice of Proposed Rulemaking.

The language of the final regulation closely resembles the proposed regulation with minor amendments to reflect some of the more compelling comments submitted. In the first place, paragraph (b) continues to list supportable activities, and paragraph (c) lists non-supportable activities. These paragraphs are not intended to be exhaustive lists, but merely a framework the State should use in distinguishing between reimbursable and non-reimbursable activities. Despite the comments to the contrary, the Commissioner believes it is essential to list non-reimbursable activities in order to avoid misinterpretation.

The specific items listed in paragraph (b) are extrapolated in large part from the statutory definition of vocational education. (All of the student organizations, of course, are subject to the Title IX provisions on sex discrimination and the section 107(b)(4)(A) requirement to eliminate sex stereotyping. Instructional materials used by the student organizations are subject to the same requirements, which are not repeated in the regulation.) Support is not limited, however, to training, field work, and acquisition of instructional supplies. Instruction oriented activities such as special demonstration projects, lectures and exhibits initiated by vocational education personnel may also be supported. Salaries of State-wide coordinators responsible for the aforementioned activities are also reimbursable as an administrative cost. Vocational counseling in connection with vocational training for the purpose of facilitating occupational choices may be supported with funds available under section 130, not section 120.

The text of paragraph (b) has been amended under subparagraph (2). The final clause "cost of travel thereto" has been deleted because, as some commenters indicated, the generally-accepted prohibition against use of Federal funds for transportation to conventions could too easily be cir-

cumvented by permitting use of Federal funds for any type of travel of students. This does not mean that funds cannot be used for travel which is part of the instructional program. Funds may be expended on an activity such as travel of class members when such travel is necessary to carry out an otherwise allowable activity such as field work.

Although paragraph (c) lists six items which cannot be funded due to their non-instructional nature, the language in (c)(1) received the most criticism. This subparagraph provides that "an integral part of vocational instruction" does not include lodging, feeding, conveying, or furnishing transportation to conventions or other forms of assemblage. This language, which is taken directly from 31 U.S.C. 551, controls the expenditure of Federal funds and all State and local funds set forth under the plan. The word "assemblage" in this subparagraph, however, was not intended to include field work and laboratory work, but rather social, athletic, or recreational events. Accordingly, the word "social" has been inserted before the word "assemblage."

Finally, paragraph (a) lists the general conditions for funding vocational education student organizations described in the approved five-year State plan. In addition to the activity being an integral part of the instruction and supervised by vocational education personnel, another condition is made explicit in light of the comments received. The activity must be available to all students in the instructional program without regard to membership in any student organization. Students cannot be excluded from the benefits of a program receiving Federal funds because they do not choose to join the student organization.

§ 104.514 *Vocational instruction under contract.*

Comment. Many commenters expressed confusion with respect to the scope of § 104.514. Some questioned whether private vocational training institutions include both private-for-profit and private nonprofit institutions. Others requested clarification on any special requirements pertaining to arrangements with private post-secondary vocational training institutions.

Response. Part of the confusion on the issue of private vocational training institutions was due to the omission of the contracting authority for private vocational training institutions in the Act. The Technical Amendments, however, restore this contracting authority. Accordingly, the regulation has been amended to reflect this revision to the Act. A new paragraph (c) has been added to § 104.514 permitting the State or LEA to make arrangements with private vocational training institutions provided that the institution (1) can make a significant contribution to attaining the objectives of the plan and can provide substantially equivalent training at a lesser cost, or (2) can provide equipment or services not available in public institutions.

In addition, paragraph (a) of § 104.514 has been amended to clarify the fact that contracts with private vocational training institutions include both for profit and nonprofit institutions.

§ 104.514 *Discrimination in private education institutions.*

Comment. A commenter suggested that no Federal funds should be shared with private educational institutions without an active effort to make certain that they do not discriminate.

Response. Title VI of the Civil Rights Act, which prohibits discrimination on the basis of race, Title IX of the Education Amendments of 1972, which prohibits sex discrimination, and section 504 of the Rehabilitation Act of 1973 which prohibits discrimination on the basis of the handicapped, are applicable to all institutions receiving Federal funds, whether public or private. The State educational agency has the responsibility for assuring that these civil rights provisions are being carried out. Since these non-discriminatory provisions are already binding on private educational institutions, no change is made in the regulation.

§ 104.521 *Work study—discrimination.*

Comment. Several commenters pointed out that some of the most overt discrimination against students takes place in the employment they obtain through their schools. School officials often acquiesce to requests from employers which discriminate on the basis of sex in placement, responsibility, salary, and advancement, and the practice has continued unabated since the implementation of Title IX. These commenters also believe that it would be contrary to the purpose of the Act to prohibit sex discrimination in vocational training but to permit it to occur in employment. They suggest that the regulation should require that no student be recommended for, placed in, or receive benefits under a job which discriminates on the basis of sex and race. Employers seeking to employ students under work study programs or cooperative vocational education programs should be required to sign assurances that they will not discriminate on the basis of sex or race in hiring, placing, or paying students.

Under all employment programs, school officials should be required to reject sex-specific employment requests and to make an affirmative effort to inform employers that the school is prohibited by law from maintaining cooperative arrangements with any employer which discriminates. Furthermore, these commenters contend that officials should bear some responsibility for monitoring employers' compliance. This could be accomplished by maintaining a simple data file indicating the company by which each student is employed; the race and sex of the student and the level in the vocational education program which she or he had completed when employed; a summary of the student's previous work experience, and a job description and the starting salary at which the student was employed. Where a school finds indications of discrimination in the employment of its students, it should be required to conduct a full investigation and withdraw the cooperation of its job referral offices if businesses are engaging in discriminatory hiring practices which they refuse to make an affirmative effort to correct.

Response. The Commissioner concurs with the concern expressed in this comment that overt discrimination against students frequently occurs in the employment the students obtain through their schools. Such discrimination practices are in direct violation of Title IX of the Education Amendments of 1972 which prohibits sex discrimination under any education program or activity receiving Federal financial assistance. This requirement, which is referenced in 45 CFR 100b.262 of GEPR, is binding on the work study program, apprenticeship program, and the cooperative education program where the issue of sex discrimination in student employment is most significant. Since the prohibition against sex discrimination is already in the GEPR, it is unnecessary to repeat the provision in the separate program regulations.

A change has been made, however, in § 104.75(e) of the regulation. Since the functions of the full-time personnel include the review of all vocational education programs in the State for sex bias, an explicit reference is now made to the review of work study programs, apprenticeship programs, and cooperative vocational education programs and the placement of students who have successfully completed vocational education programs.

Although these regulations do not require LEAs to maintain the type of data file on each student participating in work study or cooperative programs as suggested by these commenters, the full-time personnel designated to eliminate sex discrimination may want to consider seriously the adoption of this recommendation.

§ 104.521 *Work study—disadvantaged participation.*

Comment. Many commenters questioned whether work study funds would be a legitimate expenditure under the minimum percentage for the disadvantaged in section 110 (b) of the Act.

Response. In light of the enactment of the Technical Amendments, States may compute work study funds expended for the disadvantaged as a legitimate expenditure for the minimum percentage for the disadvantaged. Section 110(b) now allows for the cost of programs, services and activities under subpart 2 to be applied against the 20 percent set-aside. Since work study is a permissible activity under subpart 2, the funding of work study for the disadvantaged is an allowable cost under section 110(b). A change has been made to § 104.303 to clarify this matter.

§ 104.522(b) *Work study—ranking of applications.*

Comment. A commenter questioned whether the State must fund work study programs for all LEAs or only for some of them.

Response. Under the consolidation imposed by the Act, the State retains the discretion of determining which programs under section 120 will be funded. If work study programs are funded, then the State must give funding preference to applications submitted by LEAs serving communities having substantial numbers of youths who have dropped out of school or who are unemployed in accordance with § 104.522(b). No change is made in the regulation.

§ 104.523(a) *Work study administrative costs.*

Comment. Many commenters suggested that the last sentence of § 104.523(a) requiring work study administrative costs to be supported with non-Federal funds be deleted. Some of these commenters suggested that the following sentence be substituted: "Funds shall be expended solely for payment or compensation to students employed in work study programs."

Response. In view of the fact that the Technical Amendments now authorize the use of Federal funds for local administrative costs, the provision in § 104.523(a) prohibiting such use has been deleted. Nevertheless, section 121(b)(1) of the Act requires that Federal funds for work study be expended solely for the payment of students employed pursuant to work-study programs. As long as all Federal funds distributed under the specific work-study application are earmarked for payment to students, LEAs may use other Federal funds for local administrative costs pursuant to the methods described in § 104.307.

§ 104.523 *Work study eligibility.*

Comment. A commenter asked whether work study programs could be administered by local educational agencies only. This com-

menter stated that it should be permissible for the State board to administer the program if the State board directly operates the school.

Response. Section 121(a) of the Act limits the administration of work study programs to local educational agencies. Section 104.523 of the regulation also limits the eligibility to LEAs. In order for the State board or other eligible recipients to administer work study programs, legislative relief would be necessary. Accordingly, no change is made in the regulation.

§ 104.523(c) *Work study—20-hour limit.*

Comment. A commenter asked whether the 20-hour limit per week in the work study program conforms to Department of Labor standards. Another commenter stated that the 20-hour limit for a student 18–21 years of age may not provide enough earnings to meet the student's needs.

Response. Since section 121(a)(3) requires the Commissioner to determine a reasonable number of hours per week that a student may be employed under a work study program, it is unnecessary to conform the 20-hour limit in § 104.523(c) to Department of Labor standards. With respect to the issue of the 20-hour limit in employment being too low, it is the Commissioner's position that an amount in excess of 20 hours per week would be potentially detrimental to the student's academic efforts. Furthermore, a ceiling of 20 hours should permit the limited resources available for work study to be shared among more students. Accordingly, no change is made in the regulation.

§ 104.531 *Cooperative programs—100 percent funding.*

Comment. Many commenters questioned whether all cooperative vocational education programs may receive 100 percent Federal funding or just those cooperative programs serving students in nonprofit private schools. Some of these commenters indicated that only the cooperative vocational education program described in section 122 of the Act should include nonprofit private school students.

Response. The Vocational Education Act does not provide authority for two types of cooperative vocational education programs. Any basic grant funds used by a State for cooperative vocational education programs must meet all the statutory requirements of section 122 of the Act and §§ 104.531 through 104.533 of this regulation. States may not legally circumvent these requirements by labeling "cooperative vocational education programs" as "vocational education programs" and funding the activity under section 120(b)(1)(A).

With respect to the issue of funding, the State may fund, with up to 100 percent Federal monies, those cooperative vocational education programs being carried out by LEAs which include the participation of students from nonprofit private schools. This does not mean that the program must be designed exclusively for students in nonprofit private schools; but rather, if the program includes such students, it may be funded up to 100 percent. In order to clarify this matter in the regulation, § 104.305(a)(1) is amended to read, "Cooperative vocational education programs which include students enrolled in nonprofit private schools * * *."

§ 104.531(b) *Cooperative education priorities.*

Comment. A few commenters perceived some difficulty in LEAs utilizing the funding priority in § 104.531(b) (areas that have high rates of school dropouts or youth unemployment) because of the consolidation of cooperative vocational education programs under the grant. The issue raised is whether the LEA, having received a grant from the State, must give priority in funding cooperative education programs to areas that have high rates of school dropouts or youth unemployment.

Response. Even though the cooperative vocational education program has been consolidated under the basic grant, section 122(e) requires the State to give priority to funding cooperative programs to areas that have high rates of school dropouts or youth unemployment. The State must give priority to the applications of local educational agencies on the basis of the statutory criteria. The determination of the amount of funds earmarked for cooperative programs, however, is entirely within the domain of the State. If the State decides to fund cooperative programs, based on the local applications, then any Federal funds encumbered for cooperative programs must be expended by the LEA in accordance with the local application it submitted. In order to clarify the fact that the funding determination for cooperative programs is based on the local application, the language in § 104.531(b) has been amended.

§ 104.532 *Cooperative assurances.*

Comment. A commenter suggested that the list of assurances in § 104.532 be deleted because the Act does not require these assurances to be contained in the five-year State plan.

Response. Section 122 of the Act requires that cooperative vocational education programs conducted by LEAs include a variety of assurances enumerated in paragraphs (a) through (h). In order to ensure that the State adheres to these provisions when funding proposed cooperative programs described in the local application, the Commissioner believes it is imperative that the assurances be included in the approved five-year State plan. No change is made in the regulation.

§ 104.532 *Cooperative programs—reimbursement of added costs.*

Comment. Many commenters questioned the meaning of the provision in § 104.532(c) for reimbursement of added costs to employers for on-the-job training of students. Some of these commenters cautioned against reimbursing employers for students' mistakes on the job.

Response. This provision relating to the reimbursement of employers for the added costs has been a part of the cooperative program since 1968. The provision entitles the employer to receive the necessary reimbursement in the event the employer is faced with additional costs to his or her business because of such factors as the participating of many students or the participation of disadvantaged or handicapped students. For example, if a number of students are placed in a business establishment and the employer assigns employees to supervise those students while they are on the job then the employer may be entitled to be reimbursed for the added cost of the time the employees supervise those students. No change is made in the regulation.

§ 104.532 *Cooperative programs—private non-profit schools.*

Comment. One commenter pointed out that the proposed regulation governing the participation of students in nonprofit private schools in cooperative vocational educational programs is taken almost verbatim from the corresponding statutory language. This commenter stated that the regulation ignores the specific concerns expressed by the House Committee on Education and Labor in H.R. 94-1085 at page 46. In this passage the Committee urged the Office of Education to take more vigorous steps to implement the statutory provisions for the funding of programs involving students enrolled in nonprofit private schools. Without further elaboration in the regulation to reflect these concerns, this commenter believes that there will not be adequate safeguards to assure that eligible students enrolled in nonprofit private schools will participate in the programs on an equitable basis.

Response. The comment is accepted. A new regulation, § 104.533, is added to the section on cooperative vocational education programs to reflect the language contained in the House Report. In accordance with this regulation, the State must consult with the appropriate nonprofit private school officials at the State and local levels in order to make provision for the participation of students enrolled in nonprofit private schools. In addition, LEAs receiving funds for cooperative programs shall identify the eligible students, assess their needs, and provide them with the type of programs and services which will most effectively meet their needs. The personnel, materials and equipment necessary to provide these cooperative vocational education programs and services shall remain under the administration, direction and control of the LEA.

§ 104.532 *Cooperative programs—on-the-job training.*

Comment. Commenters expressed strong disapproval of the omission in § 104.532 of two important on-the-job training requirements which were included in the regulations (§102.98) implementing the 1968 legislation. These requirements would insure that the cooperative program provide on-the-job training that:

1. "Employs and compensates student-learners in conformity with Federal, State, and local laws and regulations and in a manner not resulting in exploitation of the student-learner for private gain"; and

2. "Is conducted in accordance with written training agreements between local educational agencies and employers". According to these commenters, the cooperative vocational programs may be converted into a job-placement type of program with less emphasis on high quality, bona fide cooperative programs. Without the structure of the training agreement, LEAs may increase the pupil-teacher ratio, increase the class size, and add responsibilities for the teacher-coordinator. Non-compensation of the student-learner may have an adverse effect on liability in case of injury to the student, and there would be no employer-employee relationship under State workmen's compensation laws.

Response. The comments are accepted and the regulation is amended to reflect the requirement for compensation and written training agreements. These requirements were inadvertently omitted from the NPRM. The Commissioner agrees with the point of view expressed by these commenters that the omission of these two requirements may have a detrimental effect on the overall quality of the cooperative vocational education program. It should be noted, however, that whereas the former regulation required the written training agreements to be submitted to the State for filing with the local application, this submission is not required by this regulation. The State shall only provide an assurance of these two requirements along with the other assurances set forth in § 104.532.

§ 104.541 *Energy education—secondary level.*

Comment. Several commenters objected to the language in § 104.541 which provides

that funds may be used for grants to postsecondary institutions for energy education. These commenters raised serious questions as to the exclusion of energy education programs from secondary schools. Some of these commenters stated that students who have no opportunity for postsecondary training deserve, nevertheless, as much chance as possible to get good training. Other commenters pointed out that their States already have successful energy education projects at the secondary level.

Response. The language of the regulation is based directly on section 123 of the Act which provides for grants to postsecondary institutions. Neither this statutory provision nor § 104.511 of the regulation has been viewed as limiting the funding of those energy education programs which may be characterized as vocational education programs exclusively to postsecondary institutions. In the event an LEA has incorporated an energy education program into its regular vocational education curriculum at the secondary level, the LEA may use funds it receives under its local application to support this program. It is imperative, however, that the energy education program at the secondary level be considered a vocational education program under section 120(b)(1)(A) and not under section 120(b)(1)(D) of the Act.

§ 104.543 *Solar energy.*

Comment. A few commenters objected to the fact that the regulation provides for the support of programs for solar energy but makes no mention of other energy areas such as oil shale. Other commenters stated that training limited only to installation of solar energy equipment is too narrow.

Response. Although the regulation follows the Act very closely in this new and emerging area, it was not intended to exclude vocational training in other energy areas such as oil shale, or hydroelectric power. Neither was it intended to exclude training in the operation and maintenance of solar and other energy producing equipment. As long as the training program may be characterized as vocational education under section 120(b)(1)(A), Federal funds may be used to support the program. No change is made in the regulation.

§ 104.552 *Location of vocational facilities.*

Comment. One commenter stated that many area vocational schools constructed with Federal funds serve racially identifiable populations and areas, often to the detriment of central city school districts which serve predominantly non-white student populations. This commenter recommended that the regulation be amended to require the State board to act affirmatively to ensure equal educational opportunities for all students.

Response. Since the construction of area vocational schools is an authorized activity under section 120 of the Act, the sites of the schools are chosen at the discretion of the State and LEA. However, the nondiscrimination provisions in 45 CFR Part 80, which effectuate Title VI of the Civil Rights Act of 1964 are binding on the State. Section 45 CFR 80.3(b)(3) provides that in determining the site or location of a facility, a recipient may not make selections with the effect of excluding individuals from, denying them the benefits of, or subjecting them to discrimination on the grounds of race, color or national origin. Furthermore, if the State makes Federal funds available to an eligible recipient for construction of a vocational facility, the funds must be distributed on the basis of the funding formula described in Section 106(a)(5) of the Act. Under this formula, priority must be given to eligible recipients located in economically depressed areas and areas with high rates of unemployment. Accordingly, Federal funds used for construction must be distributed to communities in economically depressed areas such as central city school districts.

With respect to the issue of equal educational opportunities for all students and admission policies, Title VI of the Civil Rights Act and Title IX of the Education Amendments of 1972 prohibit discrimination on the basis of race and sex. Since these provisions are binding on all institutions receiving Federal assistance, vocational facilities constructed with Federal monies may not adopt discriminatory admission policies. Thus, no change is made in the regulation.

§ 104.571 *Provision for stipends.*

Comment. Many commenters suggested that since Federal vocational education resources are so limited, the use of funds to pay stipends to students is highly questionable. These commenters believe that the available dollars should be spent to upgrade and maintain existing programs and provide for expansion.

Response. Although section 120 of the Act allows for the provisions of stipends, the decision to permit funds to be earmarked for stipends lies within the discretion of the individual States. Since the Act provides the State with this option, no change is made in the regulation.

§ 104.581. *Placement services.*

Comment. A commenter suggested that the language of § 104.581 be revised to include guidance and counseling explicitly under the section of the basic grant which permits funding of placement services for students who have successfully completed vocational education programs.

Response. Section 120(b)(1)(H) of the Act permits the expenditure of subpart 2 funds for placement services if there is inadequate funding in other programs providing similar activities, or other services are inadequate to meet the needs of the State. Although placement services are an integral part of guidance and counseling, the Act does not allow section 120 funds to be used for all activities under the general heading of guidance and counseling. Since the regulation conforms to these statutory limitations, no change is made in the regulation.

§ 104.581 *Placement services for completers.*

Comment. A few commenters were critical of the language in § 104.581 which provides placement services for students who have successfully completed the vocational education program. These commenters have urged that the placement services be made to all students who have enrolled in a vocational edcation program regardless of whether the program is completed or not completed.

Respone. The language in § 104.581 is based directly on section 120(b)(1)(H) of the Act which limits the eligibility of this activity to "students who have successfully completed vocational education programs." To expand the eligibility would contravene both the Act and the legislative history. Thus, no change is madeinthe
change is made in the regulation.

§ 104.591 *Industrial arts—mandatory funding.*

Comment. A few commenters asked whether a State could legally refuse to make Federal funds available for industrial arts programs.

Response. Although industrial arts is an authorized activity under section 120 of the Act, the matter of funding such programs lies within the discretion of the State. There is no requirement in the Act that each specific program enumerated in section 120 be funded. No change is made in the regulation.

§ 104.591 *Industrial arts for the disadvantaged and handicapped.*

Comment. A commenter asked whether prevocational and exploratory programs of industrial arts programs designed for the handicapped and disadvantaged may be charged against the section 110 minimum percentages.

Response. Prevocational and exploratory programs in industrial arts are permissible expenditures under section 120 of the Act. Since expenditures for all programs, services and activities under section 120 may be applied against the minimum percentage requirements for the handicapped and disadvantaged in section 110, the cost of prevocational and exploratory programs in industrial arts may be charged against the section 110 minimum percentages. No change is made in the regulation.

§ 104.592 *Industrial arts—sex stereotyping.*

Comment. Many commenters stated that industrial arts programs traditionally have discriminated against women by denying them entry into male-intensive fields. According to these commenters, female students encountering discrimination at the introductory vocational level are less likely to develop an interest later in nontraditional vocational courses and are handicapped when they try to enter vocational programs which require prerequisite skills and courses acquired in industrial arts programs. These commenters have recommended that, since participation in industrial arts programs can provide a crucial opportunity for introduction of women to the higher paying industrial and technical occupations, the regulation should require that industrial arts programs contribute to the reduction of sex stereotyping in the overall vocational education programs.

Response. The comment is accepted. Section 120(b)(1)(I) provides for the support of industrial arts programs which will assist in meeting the purposes of the Act. One of the primary purposes set forth in the declaration of purpose, section 101, is the development of programs to overcome sex stereotyping; therefore, the references to the purpose of the Act of overcoming sex stereotyping should be made explicit in the regulation. Accordingly, § 104.592 has been amended to reflect this concern.

§ 104.601 *Support services for women.*

Comment. Many commenters expressed concern with this section of the regulation because it only singles out problems related to women. Some of these commenters believe that, inasmuch as the Federal law is designed to eliminate sex bias, this regulation violates Title IX which provides that no program can discriminate against either sex. Others recommended that the regulation provide support services for men who enter programs designed to prepare persons for employment in jobs which have traditionally been limited to women.

Response. One of the major conclusions reached by Congress during its two years of hearings on the Vocational Education Act is that the inferior position which women now hold in the labor market is reinforced by the type of training programs available to and selected by them. Consequently, the legislation was drafted in a way to attempt to solve this problem. One of the key provisions on this matter incorporated into the Act was the section 120(b)(1)(J) program of support services for women. Section 104.601 of the regulations is based on this statutory provision. It should be noted, how-

ever, that support services for men (e.g. counseling, placement) are reimbursable under other sections of the Act. Thus, no change is made in the regulation.

§ 104.602(a) *Support services for women—counseling.*

Comment. A commenter suggested the language in § 104.602(a) be amended to include counseling on the ways to overcome the difficulties encountered in enrolling in non-traditional programs.

Response. The comment is accepted. Mere counseling on the problems involved in enrolling in non-traditional programs is inadequate if these problems are to be solved. Therefore, § 104.602(a) has been rewritten to provide for counseling on the ways of overcoming the difficulties which may be encountered by women in these programs.

§ 104.602(b) *Support services for women—job development.*

Comment. A commenter questioned whether this type of service was limited only to women who are already enrolled in non-traditional programs.

Response. Since the wording of this regulation may give the impression that the service is available only to women directly enrolled in non-traditional programs, the regulation has been clarified so that the service will be available also to women entering the programs or interested in the programs. This revision is necessary because part of the problem women encounter is overcoming previous socialization and barriers to entry in these programs.

§ 104.612(b) *Standards for day care services.*

Comment. Many commenters objected to the requirement in § 104.612(b) that day care services be governed by applicable standards of State law. Some of these commenters pointed out that certain States presently have no such standards. Some requested that all State standards be certified, and others requested clarification and guidance on the expenditure of these funds.

Response. In order to develop a degree of uniformity in the expenditure of funds for day care services, the standards set forth in the Federal Interagency Day Care Regulations, 45 CFR Part 71, will govern the provision of day care services. Accordingly, the reference in § 104.612(b) to the standards imposed by State law has been deleted.

§ 104.621(a) *Meaning of dissolution of marriage.*

Comment. A commenter asked whether the special programs for persons who had been homemakers but who now, because of dissolution of marriage, must seek employment apply only to divorced individuals.

Response. The term "dissolution of marriage" is not to be interpreted only in the strict sense of divorce. Vocational training is available to the homemaker who has experienced a separation, annulment or any other type of dissolution of marriage. No change is made in the regulation.

§ 104.622(a) *Instructional supplies.*

Comment. A commenter suggested that the language in § 104.622(a) "repair of instructional supplies" be changed to "repair of instructional equipment" because supplies are not normally repaired.

Response. The comment is accepted. The Commissioner agrees that since supplies are not normally repaired, the substitution of the term equipment would be appropriate.

§ 104.633 *Residential schools—discrimination.*

Comment. A commenter requested that the standards of Title VI of the 1964 Civil Rights Act be substituted for the present language which provides that funds may not be used for schools in which students are segregated because of race. Another commenter suggested that a new paragraph (c) be added to prohibit the use of funds for schools where there are different standards for admission based on sex.

Response. With respect to the matter of race, the regulation repeats the statutory provision that no funds may be used for residential vocational schools in which students are segregated because of race. Title VI provisions, however, are also applicable to the entire program and are referenced in 45 CFR 100b.262 of the General Education Provisions Regulations (GEPR). Also applicable are regulations in 45 CFR Part 84 which effectuate section 504 of the Rehabilitation Act of 1973. In addition, Title IX, also referenced in GEPR, prohibits the adoption of different standards for admission based on sex. Therefore, no change is made in the regulation.

SUBPART 3—PROGRAM IMPROVEMENT AND SUPPORTIVE SERVICES

§ 104.701 *Authorization for program improvement and supportive services.*

Comment. A commenter stated that § 104.701 should read that a State shall use "up to 20 percent" for program improvement and supportive services, and that a State is not required to use the full 20 percent for these activities.

Response. The Act specifically states "20 percent" and not "up to 20 percent." This is not a matter of discretion. The State must expend 20 percent of its funds for activities under Subpart 3. Funds not obligated for Subpart 3 may be carried over under the Tydings Amendment (section 412(b) of GEPA) for one year and, if not obligated during that year, would revert to the government. No change is made in the regulation.

§ 104.703 *Research coordinating unit (RCU).*

Comment. Many commenters stated that the Act permits a State to establish a research coordinating unit, and that it is not mandatory for the State to do so. Commenters recomended that the regulation be clarified.

Response. The Act states that a State "may" (not "shall") use the funds for the establishment of a research coordinating unit. However, if a State is to use any funds for research, exemplary and innovative programs, or curriculum development, it must establish a research coordinating unit in order to do so is correct as written. No change is made in the regulation.

Comment. A commenter stated that the Act stipulates that the research coordinating unit is to contract for research, exemplary and innovative programs, and curriculum development, and that the research coordinating unit may perform directly the research activities, but not the exemplary and innovative programs nor the curriculum development activities.

Response. The Technical Amendments and the legislative history of the Technical Amendments (Senate Report No. 95-142) make it clear that the RCU may perform all functions, research, exemplary and innovative programs, or curriculum development functions itself or may contract for the functions. Section 104.705, 104.706, and 104.708 are amended accordingly.

Comment. Two commenters recommended that the term "unit to coordinate research" be substituted for "research coordinating unit."

Response. The Act consistently uses the term "research coordinating unit." However, a State could call its research coordination unit by another title if it so desired. No change is made in the regulation.

Comment. A commenter suggested that the research coordinating unit be responsible for the vocational education personnel training activities as well as the research, exemplary and innovative programs, and curriculum development.

Response. There is no legal basis in the Act for requiring the RCU to be responsible for vocational education personnel training. A State may, if it chooses, charge the RCU with responsibility for coordination of vocational education personnel training. No change is made in the regulation.

Comment. Several commenters stated that the program improvement funds are a part of the State grant and must be governed by the State plan, and it is the responsibility of the State board, not the research coordinating unit, to develop the State plan. Commenters recommended that the regulation clarify the roles of the State board and the RCU.

Response. The RCU is not responsible for the development of the State plan or the comprehensive plan of program improvement. The development of these documents is the responsibility of the State board. Section 104.703(c) is amended to clarify the role of the RCU.

Comment. Several commenters were concerned that the regulation did not adequately control possible duplication of efforts in the State, and that abstracts of planned projects should be submitted to the National Center for Research in Vocational Education and the U.S. Office of Education.

Response. Section § 104.703(e)(1) requires that two copies of *approved* projects be submitted to the National Center and to the Commissioner. It would be an undue burden on the States to have to submit abstracts of *planned* projects. No change is made in the regulation.

§ 104.704 *Contract requirements.*

Comment. A commenter recommended that "demonstrate a reasonable probability" be defined.

Response. The Act does not define the expression "demonstrate a reasonable probability." The burden is on the applicant to set forth a reasoned probability that the project will result in usable improved teaching techniques or curriculum materials. Since the expression is not defined in the regulation, the State must make the determination of "reasonable probability." No change is made in the regulation.

Comment. Two commenters recommended that the words "instructional programs" be substituted for "teaching techniques or curriculum materials."

Response. "Teaching techniques or curriculum materials" is taken directly from the Act. Substituting "instructional programs" would apparently change the intent of the Act. Thus, no change is made in the regulation.

§ 104.705 *Research programs.*

Comment. One commenter recommended that States should be permitted to use results of projects that were not supported with vocational research funds.

Response. The recommendation is accepted. It is clear that the intent of the legislation is not to restrict the dissemination activities to the results of projects that were supported with vocational education funds. Section 104.705(5) is changed to implement this recommendation.

Comment. A commenter recommended that the following be added to § 104.705(2) "and programs and projects for occupational and vocational guidance which utilizes the services of certified guidance counselors. This should include programs where training and retraining of guidance personnel can be effectively evaluated as well as programs

which directly provide guidance counseling and placement services as part of the vocational education effort."

Response. The research activities listed in this regulation are taken directly from the Act. Under this present authority, the State may evaluate the effectiveness of training and retraining of guidance personnel or other personnel. No change is made in the regulation.

§ 104.706 *Exemplary and Innovative Programs.*

Comment. A commenter recommended that programs designed to facilitate the employment of older people, including people over 65 years of age be included in the list of possible uses of exemplary and innovative funds.

Response. Although older people are not separately identified as persons who would benefit from exemplary and innovative projects, they clearly are included. No change is made in the regulation.

Comment. One commenter recommended that § 104.706 give special consideration to four-year postsecondary institutions as contractors for the funds for exemplary and innovative programs.

Response. Although there is no legal basis in the Act for giving special consideration to four-year postsecondary institutions as contractors, they are not excluded. No change is made in the regulation.

§ 104.708 *Curriculum development.*

Comment. Several commenters questioned why the research coordinating units must do the contracting for the curriculum development effort.

Response. Section 133(a) of the Act, as amended by the Technical Amendments, clearly states that the contracts for curriculum development are to be made by the research coordinating units. No change is made in the regulation.

Comment. A commenter recommended the phrase "sex stereotyping" be added after "sex bias" in § 104.708(c).

Response. The recommendation is accepted. It was an oversight in the proposed regulation to have left out "sex stereotyping."

§ 104.761 *Qualifications of counselors.*

Comment. A commenter recommended that the regulation associated with the administration, supervision, conduct, and design of vocational guidance and counseling programs and services set forth the qualifications of personnel to be supported by available funds. This would include setting minimum professional standards for counselors. Administrators and practitioners should be required to meet the certification standards for practicing counselors.

Response. Since the current law does not set forth specific qualifications for these personnel and the criteria will vary from State to State, the States have discretion to establish their own certification standards. No change is made in the regulation.

§ 104.761 *Needed personnel for guidance and counseling.*

Comment. A commenter indicated that vocational guidance and counseling are vastly needed to improve vocational education programs. However, guidance and counseling personnel cannot be expected to provide all the vocational education services as outlined in the regulation. Other personnel and funds should be available to coordinate services.

Response. It is expected that the Federal funds earmarked by the State to support vocational development and guidance under this section of the Act will supplement the State's ongoing effort to improve the guidance, counseling, placement and follow-up services offered to their students. No change is made in the regulation.

§ 104.763 *Activities eligible for funding.*

Comment. Several commenters recommended a rephrasing of the statement, "funds made available to a State under the vocational guidance and counseling program (Section 134 of the Act) shall be used to support one or more of the following * * *." Various substitute language was suggested by the commenters for the phrase "to support one or more of the following * * *." In most instances, the commenters offered recommendations that, if put into the regulation, would assure the funding of specific activities and in some cases each of the eight activities listed in the Act.

Response. The Technical Amendments make the intent of Congress clear on this issue. The language of the Technical Amendments is "shall include one or more of the following activities * * *." No change is made in the regulation.

§ 107.763 *Organization of vocational guidance activities.*

Comment. A substantial number of commenters expressed the opinion that while they agreed that funds allocated under Section 130(a) shall be used to support one or more of the eight activities listed in section 134 of the Act, they questioned the reorganization of the eight activities into five as proposed in the NPRM. The commenters preferred for reason of interpretation that the eight activities be enumerated in the regulation as they appear in the Act.

Response. The major purpose for reorganizing the eight groups of activities listed in the Act into five, with appropriate subgroups, was to simplify and make clearer the meaning of the Act. Judging from the many comments received from the public on this regulation, the purpose for regrouping was not achieved. Therefore, the recommendation of the commenters is accepted, and § 104.763 is changed to conform to the language of the Act.

§ 104.763 *Eligibility for placement and follow-up services.*

Comment. Several commenters raised questions about the meaning of educational placement and job placement services, and which groups or individuals are eligible to receive funds for this activity under the Act.

Response. The law provides funds for educational and job placement services, including follow-up services, for high school, college, and university students. Educational and job placement services and follow-up is one of the eight vocational guidance and counseling activities included in the Act. The Technical Amendments make it clear that funds shall be used for one or more of these eight activities, and that the one or more activities funded shall be determined by the State. No change is made in the regulation.

§ 104.763 *Placement and follow-up services.*

Comment. A commenter recommended that the regulation specify that placement and follow-up services are concerned with the occupational programs in secondary schools, area vocational schools, community colleges, and baccalaureate or higher degree-granting institutions.

Response. The current language of § 104.763 (3) makes it clear that all the groups identified by the commenter are eligible for placement and follow-up services. No change is made in the regulation.

§ 104.764(a) *Special emphasis.*

Comment. A commenter expressed the opinion that the term "counselor" as used in this regulation could be misinterpreted or puzzling and might pose a problem regarding official counselor qualifications. This commenter recommended the deletion of the phrase "into schools as counselors * * *," and the use of the phrase "into schools as vocational career advisors for students."

Response. The language of the Act is "to bring individuals with experience in business and industry, the professions, and other occupational pursuits into schools as counselors or advisors for students." Both the Act and the regulation allow the local schools the flexibility to bring these individuals in as advisors. No change is made in the regulation.

VOCATIONAL EDUCATION PERSONNEL TRAINING

§ 104.774 *Other types of training.*

Comment. A commenter asked whether funds available under section 130 of the Act could be used to provide training for competency-based programs, teacher certification programs, vocational degree programs, and vocational leadership development programs. This commenter recommended a regulation stipulating that locally-oriented evaluation and needs assessment must be the basis for determining the uses to be made of vocational education personnel training funds.

Response. The State, through its five-year State plan and annual program plan, has the option of providing any kind of training that it believes will improve the quality of instruction, supervision, or administration of vocational education. The State may choose to base its determinations on local evaluation and local needs assessments. The recommendation that the State's options in this matter be limited by regulation is not accepted because there is nothing in the Act on which to base such a limitation. No change is made in the regulation.

Comment. One commenter recommended that § 104.774(b) be amended to read "In-service training * * * to overcome sex bias 'and sex stereotyping' in vocational education programs."

Response. The recommendation to add "and sex stereotyping" is accepted, because the Congress, in the Act's declaration of purpose (Section 101.(3)), emphasized equal opportunity in vocational education for persons of both sexes, and because it is not reasonable to suppose that after the Congress included overcoming both sex discrimination and sex stereotyping in the declaration of purpose, it meant to exclude the latter concern in programs of vocational education personnel training.

Comment. One commenter wanted the regulation to include, specifically, training in curriculum development.

Response. The recommendation is not accepted because such training may be included under the non-exhaustive list in § 104.774 at the option of the State. No change is made in the regulation.

§ 104.774 *Handicapped or disadvantaged students.*

Comment. A commenter recommended that the regulation include, as an allowable category, training to improve vocational education for handicapped and disadvantaged persons; another commenter similarly wanted to include, as a category, training to deal with "learning disabilities."

Response. Such training may already be included under the non-exhaustive list in § 104.774 at the option of the State. Nevertheless, because of the emphasis in the Act on these categories, the regulation has been amended to include them specifically.

GRANTS TO OVERCOME SEX BIAS

§ 104.792 *Overcome sex bias "and sex stereotyping."*

Comment. One commenter requested that "sex stereotyping" be added to § 104.792(a).

Response. The recommendation is accepted. Although the title of section 136 in the Act uses only the term "sex bias," the body of that section refers to "sex stereotyping and bias." It appears that "sex stereotyping" was inadvertently omitted from the regulation.

§ 104.793 *Types of projects.*

Comment. Many commenters felt that the activities listed were too limiting and examples should be deleted altogether. Many others, however, felt that the list was not comprehensive enough. Of these commenters, most wanted to add "programs to overcome sex bias" to the list.

Response. The activities listed in § 104.793 are intended to be examples, and the list is not exhaustive. Section 136 of the Act, which authorizes grants to overcome sex bias and sex stereotyping, falls under subpart 3, Program Improvement and Supportive Services; therefore, funds used under this section must go for support or improvement of vocational education programs. Insofar as programs to overcome sex bias fall into this category, they may be supported by funds under this section. No change is made in the regulation.

§ 104.793(e) *"Assisting girls and women" in selecting careers.*

Comment. Several commenters felt that § 104.793(e)(2) should not be restricted to women and girls and that the regulation should read: "Assisting persons in selecting careers." The rationale they gave for requesting the change was that males, too, need assistance in selecting careers according to their interests rather than according to stereotypes. They felt that, in leaving males out, the regulation was "sexist."

Response. The recommendation is accepted to include males as well as females. Paragraph (e) is rewritten to include assistance for all persons in selecting careers since sex stereotyping is not limited to females.

SUBPART 4—SPECIAL PROGRAMS FOR THE DISADVANTAGED

§ 104.801 *Girls and women as disadvantaged.*

Comment. A commenter has recommended that "because girls and women traditionally have been channeled into educational tracks which have not enabled them to acquire the prerequisites to pursue training for a wide range of occupations," "girls and women" should be added as a group who require special services in order for them to succeed in vocational education programs. The same commenter recommended an additional criterion, "those who lack prerequisites as a result of previous discrimination."

Response. Since the criteria for identifying those who are academically disadvantaged already include the lack of reading, writing, or mathematical skills, and failure to perform at the necessary grade level, adding a specific category for "girls and women" as disadvantaged (even those who have the necessary skills and perform at the necessary grade level) would seem unnecessary. Therefore, this recommendation is not accepted. No change is made in the regulation.

§ 104.802(a) *Youth unemployment and school dropouts.*

Comment. A commenter suggested that although the phrase used in section 140(b)(1) of the Act is "youth unemployment and school dropouts", the word "or" should be used in the regulation as both criteria need not be met.

Response. The recommendation is accepted. In order to provide a degree of consistency in the regulations for funding those programs which require prioritizing of local applications on the basis of youth unemployment or school dropouts (the work study program, the cooperative vocational education program, and special programs for the disadvantaged), the word "and" in § 104.531(b) and § 104.802(a) has been changed to "or." Funds may be used in areas of either high concentration of youth unemployment or high concentration of school dropouts.

§ 104.804 *Academic disadvantage.*

Comment. A commenter pointed out that, since academic handicaps are of such a variety, detection of academic handicaps, and symptoms of underachievement could be made earlier by a school counselor than by an instructor. The commenter recommended that qualified counseling be provided at the elementary school level and through the implementation of programs for the disadvantaged.

Response. The regulation for subpart 4, "Special Programs for the Disadvantaged," does not state who shall apply the criteria of "disadvantaged" to a particular individual. By not prescribing who must apply the criteria, the State or the LEA has the full range of options. The student, the student's parents, the student's teacher, and the school's guidance counselor may all be involved in the decision. Individual guidance and counseling for the academically and economically disadvantaged is very important. Elsewhere in the Act (section 130) and in the regulations (§§ 104.761–764) the importance of guidance and counseling activities is stressed; however, the regulation does not require the advice of a guidance counselor in every situation. No change is made in the regulation.

§ 104.804(b)(3) *Performance below grade level.*

Comment. Another commenter recommended deletion of "performance below grade level" in the definition of "academic disadvantage," considering the criteria of (b)(1) or (b)(2) adequate.

Response. Since the three criteria of paragraph (b) of § 104.804 (that is the criteria in (b) (1), (2) and (3)) are alternatives, criteria (3) need not be applied by those who do not believe performance below grade level to be a valid criterion. These criteria must, of course, be applied in relation to paragraph (d) (1) and (2) in reaching a decision whether special services are necessary. Likewise, the four alternative criteria of paragraph (c) of § 104.804 must be applied in relation to paragraph (b) (1) and (2). No change is made in the regulation.

SUBPART 5—CONSUMER AND HOMEMAKING EDUCATION

§ 104.903 *Occupation of consumer and homemaking.*

Comment. Many commenters recommended that the regulation use the term "occupation" (singular) of consumer and homemaker even though the Act uses "occupations" (plural).

Response. The recommendation is accepted. The phrase "occupation of consumer and homemaking" has been substituted. Although the regulation follows very closely after the Act, since the persons most closely associated with administration of, or instruction in, consumer and homemaking education feel strongly that the occupation of consumer and homemaking should be referred to in the singular, the regulation is amended accordingly.

§ 104.903(a) *Consumer and homemaking education at the elementary level.*

Comment. A commenter questioned the inclusion of "elementary" after the phrase "at all educational levels" because elsewhere vocational education is only for secondary, postsecondary, and adult levels.

Response. The House Report (No. 94–1085, page 50) expresly states that the program of consumer and homemaking education was expanded to include the elementary level. Therefore, no change is made in the regulation.

§ 104.904 *Preference to LEAs for creative approaches in eliminating sex stereotyping in consumer and homemaking programs.*

Comment. A commenter stated: "The regulations should require that State Plans include criteria for selection of applicants based on the degree to which the applicant places emphasis on the preparation of males and females for combining the roles of homemaker and wage earner. Local education agencies should receive preference for funding if they develop or utilize creative approaches for achieving this objective."

Response: This recommendation goes beyond the terms of the Act. While section 150(b)(1)(B) of the Act requires the State plan "to encourage elimination of sex stereotyping in consumer and homemaking programs by promoting the development of curriculum materials * * *" and to "prepare males and females who have entered or are preparing to enter the work of the home," the Act does not provide for preference in funding LEAs which show a creative approach in eliminating sex stereotyping. The Commissioner urges the States to encourage all LEAs to assure participation of both males and females in consumer and homemaking programs. The Act does not support criteria for competition among LEAs with preference in funding on this basis for some and the non-funding of others. Exemplary projects in consumer and homemaking education may, however, be funded by the State under § 104.706 or by the Commissioner under § 105.104(a)(2). No change is made in the regulation.

§ 104.904 *Scheduling for consumer and homemaking courses.*

Comment: A commenter stated: "To ensure greater availability of consumer and homemaking education programs to both males and females, the regulations must address the problem of scheduling. To implement the intent of the law there must be much greater flexibility in the scheduling of classes. Most secondary schools schedule consumer and homemaking courses during the same periods as courses which traditionally have catered to boys. Both sexes are thereby prevented from participating in the other course or both courses. The regulations should require scheduling which provides authentic options for students."

Response. I would be inappropriate for the Commissioner's regulation to require a particular scheduling of classes within a school or school system. In fact, section 432 of the General Education Provisions Act prohibits the Commissioner from exercising "any direction, supervision, or control over the * * * administration of any educational institution, school or school system * * *." A scheduling of classes, however, which prevents persons of one sex from participating in courses which have additionally catered to persons of the other sex, would be a violation of Title IX. No change is made in the regulation.

§ 104.904 *Curriculum materials which address sex stereotyping.*

Comment. A commenter recommended: "Regulations should state that no programs will be funded under this section unless they show evidence of using or developing curriculum materials that will address sex stereotyping and sex bias in the area they are addressing, e.g., programs for handicapped persons."

Response. Section 432 of the General Education Provisions Act, described in the previous response, also prohibits the Commissioner from exercising any direction, supervision or control over the "textbooks or other printed or published instructional materials by any education institution."

While the Act and regulation require the elimination of sex bias and sex stereotyping in curriculum materials, it would be inappropriate, and possibly illegal under section 432 of GEPA, for the Commissioner to require all schools to use textbooks or other material which specifically address sex stereotyping. On the other hand, schools must use textbooks and other material which are free from sex bias and sex stereotyping. No change is made in the regulation.

§ 104.904(d) *Definition of "outreach."*

Comment. A commenter recommended that "outreach programs" be defined.

Response. Section 150(b)(1)(D) of the Act and § 104.904(d) of the regulation encourage consumer and homemaking outreach programs for "• • • aged, young children, school-age parents, single parents, handicapped persons," and many others. It seems evident that consumer and home-making education programs are encouraged to "reach out" for those not normally in formal school settings. Any further definition might be limiting to the broad scope obviously intended. No change is made in the regulation.

§ 104.905 *Consumer and homemaking—guidance and counseling.*

Comment. A commenter recommended that, since the Act makes many references to guidance and counseling activities, these activities are a permissible use of funds, that is, a permissible ancillary service, in consumer and homemaking education and recommends that "guidance and counseling" be added under § 104.905.

Response. The recommendation is accepted. Guidance and counseling is recognized as an ancillary service. Funds under section 150(b)(1) of the Act for the purpose of § 104.903(c)(4) may be used for guidance and counseling of students. Therefore, a new paragraph (k) has been added at the end of § 104.905 to read:

"(k) guidance and counseling."

§ 104.906 *Federal share.*

Comment. A commenter recommended that paragraphs (a) and (b) of § 104.906 should be reversed so that the major rule as to matching (50–50) which may apply to two-thirds of the funds is stated first, and the secondary rule (90–10 matching) which applies to (at least) one third follows.

Response. The recommendation has been accepted. The two paragraphs are reversed and rewritten accordingly.

PART 105—COMMISSIONER'S DISCRETIONARY PROGRAMS OF VOCATIONAL EDUCATION

SUBPART I—PROGRAM IMPROVEMENT

§ 105.5 *Applicability of technical review criteria.*

Comment. Several commenters recommended that it should be made clear that the technical review criteria in Part 105 apply to the review of applications for grants and assistance contracts and not for procurement contracts.

Response. The recommendation is accepted. The proposed technical review criteria in the Commissioner's discretionary programs were not intended to apply to the review of proposals for procurement contracts because procurement contracts are covered by the Federal Procurement Regulations in Title 41, Code of Federal Regulations. Projects for Program Improvement under section 171 of the Act and for the Bilingual Vocational Instructional Materials, Methods, and Techniques Program under section 188 will be supported primarily through procurement contracts. A new § 105.5 is added to reference the Federal Procurement Regulations. Each Request for Proposal (RFP) will specify the criteria which will be used to select the contractor. These criteria will, of course, be consistent with the Act and the regulation. RFP's are announced in the Commerce Business Daily, not the FEDERAL REGISTER.

§ 105.101 *Elimination of sex bias.*

Comment. Several commenters expressed concern that there was not sufficient emphasis on elimination of sex bias and sex stereotyping in §§ 105.101–111. Two commenters suggested giving more points to projects dealing with this concern.

Response. The comments are accepted. In light of the fact that one of the major purposes of the Act is the elimination of sex bias, the weight given to this criterion in § 105.110 (k) has been increased to eight points. In addition, the concerns of sex bias and sex stereotyping will be dealt with through the setting of priorities.

§ 105.101 *Emphasis on contracts.*

Comment. Two commenters expressed concern that the legislative intent of emphasizing contracts over grants needs to be spelled out more clearly.

Response. The regulation now conforms to the Act with regard to this matter. Section 171(a) states that program funds are to be "used primarily for contracts, and in some cases for grants." It is clear that the program is to be administered primarily through procurement contracts rather than through grants. This mode of program administration will apply to all of the activities listed in § 105.104. No change is made in the regulation.

§ 105.102 *National Center for Research in Vocational Education.*

Comment. Some commenters expressed concern that the regulation did not reflect the language of the Act in terms of the regional research centers. The commenters recommended that § 105.102 be rewritten.

Response. The recommendation is accepted. The regulation is changed to read exactly as it is in the Act in regard to the regional research centers.

Comment. A commenter expressed concern that the section on the national center did not mention elimination of sex bias or sex stereotyping as a special concern.

Response. Section 171 of the Act, which is the section concerned with the national center, does not give special mention to sex bias and sex stereotyping. However, since a major emphasis of the Act is on the elimination of sex bias nad sex stereotyping, it will directly affect the administration of programs of the center. No change is made in the regulation.

Comment. A commenter expressed concern that the national center will have an unfair preemptive position in competing for contracts.

Response. Even though the national center will develop planning information for the Commissioner, it will in no way establish the priorities for the project support program to be administered by the Commissioner. The national center will not assist the Commissioner in the development of individual Requests for Proposals (RFPs). If the national center assisted in the preparation of a particular RFP, then the national center would not be eligible to compete for the contract under the RFP. The Commissioner will secure sole source procurements only in extremely limited circumstances and situations. No change is made in the regulation.

Comment. A commenter expressed concern that the national center could preempt all of the research activities to be funded by the Commissioner and none would be done through individually funded projects.

Response. The Commissioner does not plan to administer the program in a manner that would allow the center to preempt research activities. Greater resources will certainly be allocated to funding individual projects than to funding the national center. No change is made in the regulation.

Comment. A commenter expressed concern that the national center would have access to confidential financial information of competitors.

Response. The national center will not have access to confidential information that is protected by the Privacy Act or that is not included under the Freedom of Information Act. Copies of unfunded proposals would not be available to the national center. Copies of funded proposals, less those items protected by the Privacy Act, would be available to the national center if needed by the national center in order to carry out its clearinghouse functions. No change is made in the regulation.

§ 105.104 *Role of States.*

Comment. A commenter expressed concern that States would have too great a role in the administration of the Commissioner's discretionary projects under this section.

Response. The Act does not require that proposals requesting support from the Commissioner under the terms of section 171 be sent through the States. The Commissioner does not plan to request that proposals be sent through the States in the administration of this program. No change is made in the regulation.

§ 105.105 *Eligibility of individuals.*

Comment. Several commenters suggested that individuals not be included as eligible applicants.

Response. Since the Act does not exclude individuals as eligible applicants, no change is made in the regulation.

§ 105.106 *Cost sharing.*

Comment. A commenter objected to the statement in § 105.106 in relation to grants or contracts for program improvement: "No cost sharing is required." The objection was based on the implication, which the short sentence carries, that cost sharing will not be sought or accepted from any applicant. The commenter recommended that the sentence be reworded.

Response. This recommendation is accepted. While cost sharing is not required by the Act, an applicant may indicate it intends to contribute part of the cost of a project. The heading is changed to "cost sharing," and a new sentence is added as follows: "The Commissioner may pay all or part of the cost."

§ 105.110 *Technical review criteria.*

Comment. A commenter suggested that the requirement in § 105.108— that the grant will result in improved teaching techniques,

etc.—should be reflected in the technical review criteria in § 105.110.

Response. Section 105.108 sets forth a requirement of eligibility for grant applications. All applications for grants will be reviewed for compliance with this requirement, and then, only if the application meets this requirement will it be evaluated in accordance with the technical review criteria in § 105.110. No change is made in the regulation.

§ 105.110(k) *Sex bias.*

Comment. Several commenters recommended that points should be given in the review of applications for exemplary and innovative projects which seek to "eliminate," not "minimize" sex bias; in other words that the word "minimize" in paragraph (k) of the technical review criteria be changed to read "eliminate." Another commenter recommended that "sex stereotyping" be added to the criterion on sex bias.

Response. The recommendation is accepted. The sentence is amended to read: "The application provides appropriate plans to eliminate sex bias and sex stereotyping."

Comment. A commenter recommended that a separate criterion be established to give additional weight to applications for projects employing women and minorities in the planning and implementing of the project.

Response. The technical review criteria do not include a specific weighted criterion for proposed projects on which women or minorities will be employed. Section 105.110(h) does, however, include under "Staff Competencies and Experience" the "use of professional staff members from minorities and who are women." The Commissioner will review the applications in relation to the criteria listed in § 105.110, including paragraph (h) on staffing and paragraph (k) on elimination of sex bias. Therefore, no change is made in the regulation.

SUBPART 2—INDIAN TRIBES

§ 105.202(b) *Applicability of the Indian Self-Determination and Education Assistance Act.*

Comment. A commenter asked who determines the extent to which implementation of the regulation concerning the sections of the Indian Self-Determination and Education Assistance Act are relevant and practicable.

Response. The Commissioner of Education in the first instance is responsible for implementing the applicable sections. In the event that questions arise which might affect Bureau of Indian Affairs (BIA) policy, the Commissioner will consult the Bureau of Indian Affairs for guidance. No change is made in the regulation.

§ 105.203 *Definition of Indian tribe.*

Comment. A commenter stated that the definition of an Indian tribe and the section on eligibility were overly restrictive, and therefore, result in an inequity for an Indian organization comprised of Indians who reside in urban areas or who are not members of federally recognized tribes. The commenter further stated that Indian organizations that are not federally recognized are eligible for assistance.

Response. Section 103(a)(1)(B)(iii) of the Act is restrictively written with regard to the parties eligible to contract with the Office of Education. By reference, a tribe or tribal organization must comply with the definition in the Indian Self-Determination and Education Assistance Act, which requires that the tribe or tribal organization be federally recognized. Moreover, to be eligible, the tribe must be eligible to contract with the Secretary of the Interior under the Indian Self-Determination Act of April 16, 1934.

To the extent that other Federal departments or agencies award grants or enter into contracts with Indian tribes or organizations which are not federally recognized, it is because the definitions of Indian tribe and the standards for eligibility vary. For example, the Indian Education Act defines the term Indian to include "any individual who (1) is a member of a tribe, band, or other organized group of Indians, *including those tribes, bands, or groups terminated since 1940 and those recognized now or in the future, by the State in which they reside.*" Thus, given the less inclusive definition in the Act and the Self-Determination Act, the Commissioner has no authority to fund Indian organizations which are not federally recognized. No change is made in the regulation.

§ 105.205 *Eligible applicants.*

Comment. A commenter asked if the contract program for Indian tribes and Indian organizations would preclude Indians, specifically non-reservation Indians, from participating in non-discretionary State administered programs.

Response. The Indian contract program does not preclude members of Indian tribes from participating in State administered vocational education programs. Conference Report 94-1701 (p. 215) states that the Indian contract program is not intended to relieve the States of their obligation to provide vocational education to urban Indians. No change is made in the regulation.

§ 105.211 *Review of applications.*

Comment. A commenter suggested that applications be reviewed by the National Advisory Council on Indian Education.

Response. While some programs administered under the Indian Education Act, Pub. L. 92-318, as amended, require review by the National Advisory Council on Indian Education (NACIE), the Vocational Education Act does not provide statutory authority for the review of applications by the NACIE. However, the NACIE was afforded an opportunity to review and comment upon the Notice of Proposed Rulemaking thereby allowing for input from the Indian community. It is the statutory responsibility of the Commissioner to provide for the review of applications. No change is made in the regulation.

§ 105.211 *Minimum points received by applications to be considered for funding.*

Comment. A commenter asked if applications should receive a minimum of 50 rather than 30 points to be considered for funding.

Response. The minimum number of points an application must receive to be considered for funding remains 30 points. The Commissioner feels that this lower minimum should result in a larger number of applications which may be considered for funding. No change is made in the regulation.

§ 105.211 *Technical review criteria.*

Comment. A commenter suggested that priority in contracting be accorded to vocational education programs which serve Indians in urban areas.

Response. The Act limits the eligibility of applicants to Indian tribal organizations which are eligible to contract under the Indian Self-Determination and Education Assistance Act. Therefore, urban Indian groups are not a priority group in the regulation because the Act is written so that eligibility turns on whether an Indian organization is federally recognized under the Indian Self-Determination and Education Assistance Act. However, urban Indians are eligible to participate in the regular program. No change is made in the regulation.

Comment. A commenter suggested that the regulation give consideration to the special cultural, legal, and socio-economic status of the Indian population. The commenter further suggested that program design and service delivery include: (a) The provision of basic skills training necessary to facilitate vocational training; (b) the provision of supportive services such as child care and transportation; and (c) the payment of stipends so that Indian people can afford to participate in training.

Response. Section 103(a)(1)(B)(iii) provides broad authority for the Indian contract program. Therefore, an applicant may request support for basic vocational skills training, supportive services, and stipend support. The applicant should respond to each of the technical review criteria. No change is made in the regulation.

Comment. A commenter suggested that the need section of an application should be based upon the tribe's economic development plan, including tribal manpower data.

Response. The need section of the application may include information concerning a tribe's economic development plan. However, this should not be the sole or major criterion in that the overall objectives for an economic development plan may vary significantly from the legislative intent of this Act. No change is made in the regulation.

SUBPART 3—TRAINING AND DEVELOPMENT PROGRAMS FOR VOCATIONAL EDUCATION PERSONNEL

LEADERSHIP DEVELOPMENT AWARD PROGRAM

§ 105.302 *Length of award.*

Comment. A commenter, wishing to assure an award period of adequate length to permit effective education for leadership development, recommended that § 105.302(b) be amended to assure a minimum award period of at least 24 months to each approved applicant.

Response. The recommendation is not accepted because the expressed intent of the Congress eliminated the policy which in the past has sometimes limited the duration of leadership development awards to one year. Emphasis on a minimal commitment of 24 months would tend to weaken the effect of the present regulation which is addressed to an award period of 36 months. Furthermore, it is not believed to be in the best interest of the government or of the awardee to weaken in any way the requirement in § 105.307 that the awardee perform satisfactorily and in accordance with the regulation. No change is made in the regulation.

§ 105.303 *Equitable distribution.*

Comment. Several commenters objected to the language in § 105.303 that "the Commissioner will apportion leadership development awards equitably among the States * * *" for the reason that the word "apportion" gives the impression that the awards will be apportioned, by formula, in advance of receipt of applications. They recommended that the sentence be reworded.

Response. This recommendation has been accepted. Although the proposed regulation follows section 172(b)(4) of the Act closely, the language of § 105.303 of the regulation is changed to make clear that there will not be a formula allocation of awards to the States.

§ 105.304 *Post-doctoral study.*

Comment. A commenter recommended specific prohibition of awards to post-doctoral students.

Response. It is possible that a person with the doctoral degree in engineering, or any other field, might seek to become a professional leader in vocational education. Although the Act and its legislative history do

not address this point, it cannot safely be assumed that the Congress meant to preclude giving an award to such a person. No change is made in the regulation.

§ 105.304 *Role of research.*

Comment. A commenter recommended deletion of the phrase "or research" from paragraph (b), which would then read, "In order to receive a leadership development award the person selected shall enroll for full-time graduate study in a vocational education leadership • • •"

Response. The recommendation is accepted and the regulation is changed accordingly. Graduate study includes all of the employment categories suggested in the Act (e.g., administrators, supervisors, teacher educators, researchers, guidance and counseling personnel). Nothing in the Act warrants establishing the elements of study and research as mutually exclusive alternatives.

§ 105.305 *Graduate-level study.*

Comment. A commenter pointed out that although in H.R. Report No. 94–1085, p. 54, the Congress advises the Commissioner to solicit recommendations "from graduate schools offering these programs," the regulation reads "from representatives of vocational education programs in institutions of higher education." The commenter notes that the programs might or might not be at the post-baccalaureate or doctoral level.

Response. The point is well taken. However, the Commissioner prefers not to make the suggested change in order to permit and encourage solicitation of recommendations from all levels of instruction, including, the doctoral level. No change is made in the regulation.

§ 105.305 *Role of the State board.*

Comment. A commenter finds paragraph § 105.305(b) to be "extra-statutory and misrepresentative of H.R. Report No. 94–1085" in that it gives excessive authority to the State board.

Response. The Commissioner was keenly aware of the criticism expressed in H.R. Report No. 94–1085 and it took fully into account in drafting the regulation. In light of the legislative history, the regulation is designed to obtain advice from the State board and to use the board as a conduit for securing advice from the "other agencies." On the other hand, the total role of the State board has been changed because the applications are sent directly to the Commissioner (rather than through the State boards, as in previous years) and will be reviewed independently by the Commissioner's designees in the Office of Education. For these reasons, the recommendation to revise the regulation is not accepted.

§ 105.305 *Advice from others.*

Comment. Several commenters objected to having the State board forward to the Commissioner only a summary of its own advice and that of the "other agencies" and "representatives," on the grounds that the authority to prepare such a summary increases unduly the role of the State board.

Response. In order to clarify the role of the State board, the regulation is revised to require the State board to forward the complete statement of advice from each such agency and representative.

§ 105.307 *Part-time employment.*

Comment. A commenter wanted the part-time employment referred to in § 105.307(a)(3) to be limited to 50 percent of the awardee's time, and wanted a regulation to clarify how approval for part-time employment is obtained.

Response. Experience with the leadership development award program in previous years shows that there are many patterns of part-time employment in terms of hours per day or week and number of weeks or months. It has not seemed feasible to attempt to foresee them all and regulate accordingly. Therefore, the matter will be handled as in the past, by individual request from each participating institution to the Commissioner and review of each request on its merits. No change is made in the regulation.

§ 105.309 *Application review criteria.*

Comment. Many persons took exception to the proposed criteria for judging applications. One wanted the weights of the criteria changed to favor younger, less experienced applicants. Several commenters wanted much more weight given to evidence of intellectual ability as shown by academic achievement. One pointed out the similarity of criteria (b) *Leadership potential and criterion*, and (e) *Human relations skills*, which would tend to favor certain candidates. Several wanted the Commissioner to set minimum levels which must be attained for each criterion. Several perceived that the proposed criteria would result in discrimination against women and racial minorities, and would favor older persons with "stereotyped" accomplishments. One commenter recommended that in paragraph (g) of § 105.309 special consideration be given to women. One commenter urged elimination of the entire section on review criteria.

Response. Since the Commissioner must review all applications and must, of necessity, use criteria for that purpose, it is the policy of the Office of Education to publish the criteria in advance.

Most of the other comments and recommendations relate to the weight assigned to each of the criteria. In view of the comments, a reconsideration of the weighting has resulted in several revisions set forth in the final regulation.

The weight given to evidence of academic ability has been increased, and the weight given to communication skills has been reduced. The criterion (e) *Human relations skills* has been eliminated as such and included under criterion (b) *Leadership potential* as skill in interpersonal relations.

Neither the Act nor its legislative history provides any support for weighting of the criteria to favor either younger or older persons. Consequently, the recommendations in this regard were not accepted.

§ 105.309 *Application review criteria—academic ability.*

Comment. A commenter recommended changing criterion (a) *Academic ability* to require the applicant to submit transcripts of grades earned in college, including graduate courses, instead of leaving this submission to the option of the applicant. The same commenter suggested that item (3) of the same criterion be deleted, on the grounds that skill aptitude tests are not given at the graduate study level.

Response. The recommendation to require submission of transcripts is accepted and the regulation changed accordingly. A record of the applicant's grades is indispensable for proper review of his or her qualifications. The second recommendation, to delete the item referring to skill aptitude test, is not accepted, because submission of such information is optional, and because the applicant's scores on such tests, irrespective of when the tests were taken, is evidence of the applicant's abilities.

§ 105.310 *Number of participating institutions.*

Comment. A commenter recommended that the number of approved institutions be limited to twenty. The commenter saw this as a means of helping to assure that only institutions with highest quality doctoral level programs would be assigned leadership development awardees. The recommendation was perceived also as a way to assure a "critical mass" of awardees at each participating institution. A commenter with the same concern wanted the number of awardees per institution to be no fewer than ten and no more than twenty.

Response. While these concerns are shared by the Commissioner, § 105.310 was not made more specific because of the need to accommodate possible fluctuations in the level of funding allocated to this program. It is believed that, by judicious use of the right to redistribute award recipients among approved institutions, the effect desired by both commenters will be achieved, whatever the level of funding of the program. No change is made in the regulation.

§ 105.311 *Comprehensive graduate programs.*

Comment. A commenter recommended that a participating institution should be required to offer at least four doctoral programs in supporting technical disciplines of agriculture, business administration, engineering, health sciences, and home economics, plus doctoral level programs in sociology, psychology, computer science, philosophy, and an area of "communications." The same commenter recommended that the regulation require a much broader, more comprehensive graduate program of vocational education than is now stipulated.

Response. The recommendation is not accepted. Despite the desirability of the recommended program, to require such a program would exclude from participation in the leadership development program many of the institutions which have already demonstrated their capabilities for training leaders. In setting the standards presently required in the proposed regulation, the Commissioner has in mind first the interest of the student awardees, who will legitimately have preferences among institutions, in respect to distance from their present homes, etc. The Commissioner's decision to make no change in the proposed requirements for eligibility of institutions is based also on the grounds that more restrictive criteria for eligibility would tend to enmesh the leadership development program unduly into the specific doctoral requirements of traditional technical fields. No change is made in the regulation.

VOCATIONAL EDUCATION CERTIFICATION FELLOWSHIP PROGRAM

§ 105.431 *Source of funding.*

Comment. A commenter advised against having the certification fellowship program "compete for funds" with the leadership development program, and recommended that the former program be supported with funds provided to the States through Section 135 (§ 104.771 of the regulation). The commenter reasoned that the need for leadership development awards would so lessen the "critical mass" of awardees as to lose the benefits of group interaction.

Response. Funds for both the State-administered Vocational Education Personnel Training (§§ 104.771–104.776) and the Commissioner's two discretionary programs, *Leadership Development* (§§ 105.301–105.312) and *Certification Fellowships* (§§ 105.431–105.443), are authorized by Section 103 of

the Act. Section 103 requires that a specified portion of the appropriated funds be reserved for use by the Commissioner and that the balance be allotted to the States. The Commissioner's portion and the State's portion cannot be modified without a Congressional amendment. Therefore, funds available for the State-administered part under Section 135 cannot be used to support the Commissioner's Vocational Education Certification Fellowship Program. No change is made in the regulation.

§ 105.431 *Teacher or educators.*

Comment. Two commenters recommended that in § 105.431 the term "vocational educator" should be changed each time it occurs to "vocational teacher."

Response. Although there is merit in the suggestion for use of the more widely used term, teacher, the recommendation is not accepted. The Congress used "educator" in the statute, and without compelling reasons to the contrary, the Commissioner prefers that the regulation use the terminology of the statute. No change is made in the regulation.

§ 105.431 *Emphasis on shortage of teachers.*

Comment. A commenter recommended that § 105.431(a) be changed to read "* * * if those teachers have skills and experience in vocational fields for which there is a need for vocational teachers and for which they can be trained * * *." The rationale for adding the clause *for which there is a need for vocational teachers* is that there are some fields of vocational education which have a surplus of teachers and for which no additional ones should be trained. The commenter wanted the same change in § 105.432 (a)(1), for the same reason.

Response. The recommendation is accepted. Although the statute does not require that there be a need for vocational teachers in reference to applicants for fellowships who are certified teachers, it does contain this requirement with respect to applicants who are employed in industry. That both classes of applicants should be treated alike in this respect is supported at two points in the statute: first, section 172(c)(1) states that the fellowship program exists "in order to meet the need to provide adequate numbers of teachers * * *" and thereby establishes the overall criterion of need; and second, section 172(c)(7) requires the Commissioner to determine, annually, the areas of teaching where there is need of additional teachers and to award the fellowships, preferentially, for study in those areas. The amendments will help to assure that the limited funds available to the fellowship program are used where they are most needed.

§ 105.432 *Categories of fellows.*

Comment. A commenter advised that in paragraph (a) of § 105.432 the word "including" be changed to "other than" on the grounds that if a person has already been certified to teach vocational education, there is no need for additional training.

Response. There is nothing in the statute or its history to suggest that a person who has been a teacher of vocational education in a field where there is no longer employment could not apply for a certification fellowship in order to be able to work in a field where there is need for teachers. Therefore, no change is made in the regulation.

Comment. Another commenter urged that the parenthetical expression in paragraph (a) of § 105.442 be changed to read "(including other thirteenth and fourteenth year programs)." The rationale was that there are hundreds of educational programs at the thirteenth and fourteenth year levels which are not in community or junior colleges and where there are teachers in a variety of fields who should be eligible for consideration as applicants for certification fellowships.

Response. The recommendation is accepted. It seems reasonable to include as potential beneficiaries teachers in all programs at the thirteenth and fourteenth grade levels, rather than only those designated as junior or community colleges. The recommendation is particularly valid because many of the "other" programs are in technical and vocational education. The regulation is changed accordingly.

§ 105.434 *Role of the State boards.*

Comment. A commenter feared that State boards might be inclined to favor certified teachers, and recommended therefore that a more objective procedure be adopted for reviewing applications.

Response. All applications will be objectively reviewed by the Commissioner, who customarily uses teams of persons drawn from both inside and outside the Office of Education for this purpose. The review by the State board (with advice from the State advisory council and other agencies and representative individuals) will provide valuable additional input to the Commissioner's review of the applications. No change is made in the regulation.

§ 105.434 *Advice from others.*

The recommendation regarding § 105.305 (b), that the State board should transmit to the Commissioner the full statements of advice about applications rather than a mere summary of that advice, was found to be equally applicable to the certification fellowships program. Accordingly, § 105.434(b) is amended to correspond to the changes made in § 105.305(b).

§ 105.440 *Eligibility of institutions.*

Comment. A commenter asked generally about the difference in stringency of criteria for eligibility of institutions to participate in the Leadership Development Program and the Certification Fellowships Program.

Response. The requirements for institutional participation in the Leadership Development Program (§ 105.311) are for work at the level of graduate study and are therefore much more demanding than the requirements for the baccalaureate level fellowships program.

§ 105.441 *Priority to areas of need.*

Comment. A commenter noted the omission in the regulation of the language in Section 172(c)(7) which requires the Commissioner to give priority in the awarding of fellowships to those which are focused on the designated areas of need for vocational education teachers. The commenter requested that the omission be corrected.

Response. In view of the omission, the recommendation is accepted. Section 105.441(a) is amended by the addition of this language: "and will, to the maximum degree possible, award fellowships under § 105.432 to applicants seeking to become teachers in the areas identified."

§ 105.442 *Emphasis on areas of need.*

Comment. A commenter wanted § 105.442 (a)(2) amended to recognize the emphasis on areas or fields of vocational education where additional vocational educators are needed (as required by § 105.441). The amended text would read, "Past or current skills and experiences in the vocational field(s) in which there is a need for additional educators and * * *"

The same commenter requested the addition of an item (3) to § 105.442: "inability to find employment in his or her field of previous certification." The rationale was that Section 172(c)(1) includes that qualification, which must therefore have been omitted by inadvertence.

Response. Both recommendations are accepted. The change in § 105.442(a)(2) serves to emphasize the requirement of § 105.441 of the regulation, and a new subsection (3) under § 105.442(a) has been added which reads "inability to find employment in his or her field of previous certification."

§ 105.443 *Emphasis on the handicapped.*

Comment. A commenter recommended that the application review criterion related to national need (paragraph (e) of § 105.443) be strengthened by adding special education for the handicapped to paragraph (e) of § 105.440 as a part of the undergraduate program of vocational education.

Response. The Act requires that the undergraduate program of vocational education have adequate support services and disciplines, but does not go beyond suggesting which support services and disciplines shall be included. Since special education for the handicapped is a critical program element, the recommendation is accepted and § 105.440(e) is changed accordingly.

§ 105.443 *Additional review criteria.*

Comment. A commenter recommended that a fourth category, "women," be added to the list of groups meriting special attention under paragraph (e) of § 105.443, *National need.*

Response. Because of the strong emphasis in the Act on eliminating sex bias and sex stereotyping, the recommendation is accepted. The initial sentence of the paragraph is modified to read "* * * with particular reference to the elimination of sex stereotyping *and* to working with the following populations." Further support for this change is found in § 105.441, which provides that the Commissioner will identify areas of teaching in vocational education where there are or will be shortages of personnel. Also a reasonable assumption may be made that there is a shortage of women teachers and of persons capable of teaching women in many areas of vocational education.

Comment. A commenter asks that a fourth category be added to paragraph (f) of § 105.443 to favor applicants who desire to be trained in a "nontraditional" teaching field.

Response. The recommendation is accepted. H.R. Report No. 94–1085, p. 55, supports this non-traditional emphasis which may be interpreted to mean women (or men) teaching in fields traditionally reserved to the other sex, and also to mean any person teaching in a new field or a field not commonly taught. The new fourth item has been added to § 105.443(f) which reads as follows: "(4) The applicant's intention to become certified in a vocational field not traditionally open to persons of the applicant's sex, or to become certified in a new field or one not commonly taught."

§ 105.443 *Weighting of review criteria.*

Comment. Two commenters urged that the weight assigned to criterion (a) *Academic ability* be increased to 30 points and the weights for criterion (b) *Vocational skills* be increased to 40 points, with corresponding reductions in the weights assigned to other criteria. The rationale was that criteria (a) and (b) are by far the most important.

Response. Due to the overall importance of criteria (a) and (b) the regulation is revised to increase criterion (a) to 25 points and criterion (b) to 35 points, and criterion

(c) *Communication skills* is reduced to 15 points.

SUBPART 4—EMERGENCY ASSISTANCE FOR REMODELING AND RENOVATING OF VOCATIONAL EDUCATION FACILITIES

§ 105.502 *Eligible applicants for emergency assistance for remodeling.*

Comment. Commenters indicated that the legislative history does not sustain the argument made on page 18549 of the preamble to the NPRM that the bill, as enacted into law, was expanded to include all LEAs as eligible applicants; to the contrary, they maintain that only LEAs "in urban and rural areas" are eligible and recommend that § 105.502 be amended accordingly.

Response. The recommendation is accepted. Congressional intent indicates that only urban and rural LEAs are eligible under this program, and that suburban LEAs are not eligible. Section 105.502 is amended to limit eligibility to LEAs in urban and rural areas and definitions on "urban" and "rural" have been added. Since these definitions apply only to the emergency facilities program, they are not repeated among the definitions of general applicability in Appendix A.

§ 105.504 *Functions of the State board in relation to applications for emergency assistance for remodeling.*

Comment. A commenter asked what the State board must do in relation to applications by LEAs for emergency assistance for remodeling and renovation. The commenter questioned whether the State board makes the decision on funding in the State and suggested that the State board's functions be specified in the regulation.

Response. Section 193(a) of the Act requires that the LEA send its application to the Commissioner through the State board. This requirement is repeated in § 105.504 of the regulation. Section 193(a) of the Act requires that the application contain "such other information as the State board determines to be appropriate." This requirement is repeated in § 105.503(g) of the regulation. Thus, the Act and the regulation require the application to be sent to the State board and require that when the application is sent on by the State board to the Commissioner, it contain whatever additional information the State board considers necessary. The State board should review the application and ask the applicant to add to its application any information which the Commissioner will need for decision. The decisions on awards must be made by the Commissioner. Since § 105.503(g) follows the Act and gives the State board wide leeway in requesting any additional information it considers appropriate, no change is made in the regulation.

§ 105.505 *Emergency assistance for remodeling.*

Comment. A commenter asked what is meant by "emergency assistance for remodeling" and whether the program is limited to assistance after a natural disaster or to assistance for renovation where local tax efforts have been insufficient.

Response. The program of "emergency assistance" is not limited to assistance for remodeling after a natural disaster. The program is a special four-year program of assistance for remodeling in urban and rural areas which was added after Congress heard testimony of "the inadequacy of facilities in urban and rural areas." (Senate Report No. 94-882, p. 88.) As to assistance where local tax efforts have been insufficient, section 193(b)(1) of the Act stresses as the first criterion the need for Federal assistance. Applications will, under § 105.505, be ranked according to the relative need for assistance as determined by the criteria in § 105.505(b). No change is made in the regulation.

§ 105.505(b)(8) *Criteria for award of emergency assistance for remodeling.*

Comment. Commenters suggested that criterion (8) in § 105.505(b) for review of applications submitted to the Commissioner for emergency assistance for remodeling should be deleted; five points should not be given for evidence that the proposed facilities "complied with the law and did not result in sex discrimination or bias against the handicapped."

Response. The recommendation is accepted. Criterion (8) is deleted and the five points are added to criterion (1), giving a maximum of 17 points for evidence of the age or obsolescence of the facilities for which Federal assistance is sought. Since it is a requirement of law that educational facilities not discriminate on the basis of sex or discriminate against the handicapped, it is not reasonable to give five points for evidence in the application that these requirements of law have been met. For that reason, criterion (8) is deleted. Applications will be reviewed, of course, to make sure that the proposed remodeled facilities do not result in discrimination on the basis of sex or handicap.

SUBPART 5—BILINGUAL VOCATIONAL EDUCATION

§ 105.604(a) *Submission of applications.*

Comment. A commenter suggested that in order not to delay the submission of applications they should be submitted simultaneously to the Office of Education and to the State Board for Vocational Education, and that the State board be given 30 days following the closing date for applications to submit its comments to the Office of Education.

Response. The comment is accepted. The procedure set forth in § 105.604(a) is for the applicant to submit a copy of the application to the State board for comment. Since a copy would be submitted to the board, it was implicit in this regulation that the original application be submitted directly to the Commissioner. The regulation reflects this procedure. In addition, the regulation is amended to require that the State board submit its comments to the Commissioner within 30 days following the closing date for applications.

§ 105.611 *Bilingual Vocational Instructor Training Program.*

Comment. A commenter recommended that the Commissioner make an effort to simplify the various teacher training programs within the Vocational Education Act and also to develop an effective means of coordinating these programs with similar teacher training programs administered by the Office of Education. This commenter contended that, without simplification and coordination, American education will be confronted with overlapping and ineffective management.

Response. The Vocational Education Act contains three separate authorities for teacher training programs.

The Vocational Education Personnel Training set forth in § 104.771 is a State-administered program. The Bilingual Vocational Instructor Training Program in § 105.611 addresses a specific need to improve the overall Bilingual Vocational Training Program. The Vocational Education Leadership Development Program in § 105.301 allows experienced vocational educators to spend full time in advanced study of vocational education. In view of the fact that one program lies exclusively within the domain of the State, and the other two discretionary programs address separate objectives in—as a general rule—separate institutions, it is not feasible to consolidate or simplify the three programs. Therefore, no change is made in the regulation.

APPENDIX A

DEFINITION

Comment. One commenter strongly supported a comment recorded in response to the NOI that the definition of vocational education should be broadened to include guidance elements and thus reduce the need for funding guidance as a supportive service.

Response. While there is merit in the comment, the definition of vocational education in the Act (Sec. 195(1)) does not include vocational guidance and counseling. No change is made in the regulation.

APPENDIX—"COOPERATIVE EDUCATION."

Comment. A commenter recommended expanding the definition of "cooperative education" to add two requirements that the program:

(1) "employs and compensates student-learners in conformity with Federal, State, and local laws and regulations in a manner not resulting in exploitation of the student-learner for private gain, and

(2) "is conducted in accordance with written training agreements between local educational agencies and employers."

Response. While the recommendation raises two very important points, the definition of "cooperative education" comes directly from section 195(18) of the Act and is not changed. The recommendations are added as requirements in the Cooperative Vocational Education Programs in § 104.531 as new paragraphs (c) and (d).

APPENDIX—"CURRICULUM MATERIALS."

Comment. A commenter suggested as an alternative definition of "curriculum materials" the following:

"Curriculum materials" means instructional resources both print and non-print, used in any teaching and learning process designed to prepare persons for employment or to upgrade the competencies of persons previously or presently employed in any occupational field."

Response. While the proposed definition has much merit, particularly in not limiting curriculum materials to printed materials, the definition in the Appendix comes from section 195(19) of the Act with only slight modification. No change is made in the regulation.

APPENDIX—"FINANCIAL ABILITY."

Comment. A commenter recommended that a definition of "financial ability" be added, to define the term as used in section 106(a)(5)(B)(i) of the Act.

Response. The recommendation is accepted. A definition of "financial ability," taken from the House Report (H. Rept. No. 94-1085, p. 34) is added.

APPENDIX—"HANDICAPPED."

Comment. Many commenters objected to that part of the definition of handicapped which included "learning disabilities to the extent the disability is a health impairment," pointing out that most learning disabilities (LD) are not health-related problems at all, but are learning-related problems (perceptual handicaps, brain injury, dyslexia or developmental ophasis). Commenters recommended that the definition in the Appendix to the Vocational Education Act should conform to the definition in the Education of the Handicapped Act, Pub. L. 94-142 and the regulations thereunder.

Response. The Technical Amendments (Pub. L. 95-40) conformed the definition of "handicapped" in the Vocational Educa-

tion Act to that in the Education of the Handicapped Act. The amended definition includes "specific learning disabilities" as a handicapping condition. The definition of "specific learning disabilities" will be consistent with the definition finally promulgated by the Commissioner under the Education of the Handicapped Act. It will be necessary to look to the regulations under the Education of the Handicapped Act as published in final form for the definition of "specific learning disabilities."

APPENDIX—"HIGH SCHOOL."

Comment.—A commenter recommended a definition of "high school" be added to replace that of "secondary programs."

Response. The recommendation has been accepted by adding the definition of "high school program" and revising the definition of "secondary program" as follows:

"High school program" means vocational education for persons in grades 9 through 12.

"Secondary program" means vocational education for persons in secondary grades as defined by State law.

APPENDIX—"INSTRUCTIONAL TECHNOLOGY."

Comment. A commenter objected that the definitions do not include a definition of "instructional technology" since instructional technology "is playing an ever increasing role in the armed services, industry, government, medicine and the whole of education." No proposed definition was included in the comment.

Response. While there are many terms which could be defined, the Appendix contains only definitions of terms which must be defined for interpretation of the Act or the regulation. A definition of "instructional technology" is not necessary for interpretation of the Act or regulation, and for that reason, is not added to the Appendix. No change is made in the regulation.

APPENDIX—"LIMITED ENGLISH-SPEAKING ABILITY."

Comment. Several commenters have recommended that a definition of "limited English-speaking ability" be added, to define in the Appendix the term as it is used in §§ 104.303(b)(2) and 104.317(a)(2) as to the 20 percent set-aside part of which is used for persons of limited English-speaking ability.

Response. The recommendation is accepted. A definition of "limited English-speaking ability" (LESA) has been added in its alphabetical order in the Appendix. The definition is that used in section 703(a)(1) of the Bilingual Education Act, 20 U.S.C. 880b–1. This definition will explain the term as used in §§ 104.303(b)(2), 104.313(a)(2) and 105.601.

APPENDIX—"POSTSECONDARY PROGRAMS"—CERTIFICATE OF COMPLETION

Comment. Many commenters suggested adding to the definition of "postsecondary programs" those programs leading to a certificate of completion of hours of study or certificate of completion of a series of courses.

Response. The House Report (H. Rept. No. 95–1085, p. 48) indicates that Congress did not intend that persons working toward certificates of completion should be considered under the definition of "postsecondary programs." For that reason the suggestion was not accepted. No change is made in the regulation.

APPENDIX—"SECONDARY PROGRAM"

Comment. A commenter urged that the word "usually" be dropped from the definition of "secondary" and that the grades be specified as "beginning with grade 9 and ending with grade 12."

Response. The definition of "secondary program" has been rewritten to leave to determination by State law the span of grades considered as "secondary." A definition of "high school" has also been added to the Appendix.

APPENDIX—"VOCATIONAL EDUCATION"—GUIDANCE

Comment. A commenter strongly urged that the definition of vocational education should be broadened to include guidance elements and thus reduce the need for funding guidance as a supportive service.

Response. While there is merit in the comment, the definition of vocational education in the Act (Sec. 195(1)) does not include vocational guidance and counseling. No change is made in the regulation.

APPENDIX—"VOCATIONAL INSTRUCTION"

Comment. A commenter objected that the definition of "vocational instruction" does not include planning, assessment, and evaluation.

Response. Planning, assessment, and evaluation are not elements of the statutory definition of "vocational instruction." For that reason they should not be included in the definition of "vocational instruction" in § 104.512 or in the Appendix. No change is made in the regulation.

[FR Doc.77-28843 Filed 9-30-77;8:45 am]

☆ U. S. GOVERNMENT PRINTING OFFICE : 1977 248-123/6612